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No. 89-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

EXXON CORPORATION AND TEXACO INC.,
Petitioners,

v.

CITY OF LONG BEACH, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in an antitrust case alleging a conspiracy to fix *low* prices for crude oil, a court of appeals may reverse a grant of summary judgment for those defendants who were sellers of crude oil and had an indisputable interest in *high* prices

   (a) without evaluating the sufficiency of the evidence with respect to those defendants, considered individually, to determine whether a jury could rationally find that they possessed a plausible economic motive to conspire, *see United States v. United States Gypsum Co.*, 438 U.S. 422, 463 (1978); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253 (1968); and

   (b) by relying, instead, solely upon rank speculation about the defendants' motives to conspire. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

2. Whether mere "conscious parallelism" is sufficient to support a finding of conspiracy under section 1 of the Sherman Act. *See Theatre Enter., Inc. v. Paramount Film Distrib. Co.*, 346 U.S. 537, 540-41 (1954).

PARTIES

The parties to this case in the court of appeals were the two plaintiffs, City of Long Beach and State of California, and the six defendants, Chevron Corporation, Exxon Corporation, Mobil Oil Corporation, Shell Oil Company, Texaco Inc., and Union Oil Company of California. The affiliates and partially owned subsidiaries of petitioners Exxon Corporation and Texaco Inc. are listed at Apps. G and H.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Exxon Corporation ("Exxon") and Texaco Inc. ("Texaco") hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is reported at 872 F.2d 1401. Following publication, the opinion was amended by order dated September 22, 1989 (App. B), and reported at 886 F.2d 246. The district court's memoranda of decision (Apps. C, D, E, and F) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 1989 (the court did not issue a separate judgment). Timely petitions for rehearing were denied on September 22, 1989 (App. B). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE AND RULE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, in pertinent part provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

Fed. R. Civ. P. 56(c) in pertinent part provides:

> [Summary] judgment . . . shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

STATEMENT

Petitioners are two major oil companies that were sellers of crude oil and would have benefited from *high* prices. Yet, they are accused of joining in a conspiracy with buyers to fix *low* prices—a conspiracy that, if it had existed, would have cost the petitioners tens of millions of dollars.

After years of exhaustive discovery, the district court granted summary judgment for all defendants finding, *inter alia*, that the two petitioners had no rational motive to participate in a conspiracy to depress prices. The court of appeals reversed without attempting to evaluate the sufficiency of the evidence to determine whether a jury rationally could find that the petitioners, considered individually, had a plausible motive to conspire against their evident self-interest. Instead, the court uncritically accepted plaintiffs' unsubstantiated conjecture about far-fetched motives. Although the court agreed with the district court that there was no direct evidence of the alleged conspiracy, it deemed plaintiff's conjecture about motives, plus mere parallel conduct, to be sufficient to support a finding that the petitioners had conspired.

By effectively dispensing with the threshold requirement of a plausible conspiratorial motive, and by resurrecting the discredited notion that mere conscious parallelism is sufficient to support a finding of conspiracy, the decision below radically departs from settled antitrust doctrine and threatens to undermine the utility of summary judgment in complex antitrust litigation such as this.

1. Background.

a. *Introduction.* Respondent City of Long Beach ("Long Beach"), both as proprietor and as trustee for respondent State of California, holds mineral rights to a portion of Wilmington Field, a substantial oil field in southern California. Respondents claim that the defendants—petitioners Exxon and Texaco and five other companies—conspired to depress the price of California crude oil during the period from 1961 through 1977, in violation of section 1 of the Sherman Act, 15 U.S.C. § 1. They seek damages of approximately $280 million (before trebling).

Each of the five other defendants—Atlantic Richfield Company ("Arco"), Chevron Corporation ("Chevron"), Mobil Oil Corporation ("Mobil"), Shell Oil Company ("Shell"), and Union Oil Company of California ("Union")—was a net buyer of California crude oil during the relevant period. App. C at 40a. In contrast, Exxon was exclusively a seller of California crude oil at the time it allegedly joined the supposed conspiracy and for years thereafter; similarly, Texaco had the motivation of a net seller and would have benefited from higher prices for crude oil. *Id.* at 39a-40a; ER 79, 4111 ("ER" and "Supp. ER" refer to the record excerpts on appeal). Thus, Exxon's and Texaco's economic interests coincided with those of respondents themselves.

b. *Posted prices.* "Posted prices" are "published assertions by major purchasers as to the prices they [are] willing to pay for various grades of crude oil [at various

locations]." App. C at 32a. Buyers post lower prices for heavier crude oil, because such crude oil is "less desirable for refinery feed stock than lighter weight crudes." App. A at 7a.

Throughout the 1960s and 1970s, Arco, Chevron, Mobil, and Union, as major purchasers, posted prices for crude oil in fields throughout California. App. C at 32a. Exxon has never posted prices for California crude oil. Supp. ER 119-20. Texaco at one time posted prices in California but stopped doing so as early as 1962 because it was purchasing insignificant amounts of crude oil. Supp. ER 2704-12.

c. *Respondents' allegations of motive and conspiracy.* In 1975, respondents brought this suit in the United States District Court for the Central District of California, alleging that the defendants had engaged in a conspiracy to depress posted prices for California crude oil. Jurisdiction rested on 28 U.S.C. § 1331.

Respondents alleged that the defendants other than Exxon organized the conspiracy in 1961 and that Exxon joined in 1965. The effect of the alleged conspiracy, according to respondents, was to depress posted prices for California crude oil—particularly for heavy crude oil—by more than 90 cents per barrel. ER 4284-85.

Respondents further alleged that the defendants were motivated to participate in the alleged conspiracy because they "were net purchasers of crude oil and that '[i]f heavy crude prices rose, . . . the defendants would be hurt. They had an incentive to ensure that competition did not break out in this marketplace because if competition broke out in this marketplace heavy crude prices would rise, and that would be against their economic incentives.' " App. C at 39a.

d. *Respondents' claims with respect to three-cut exchanges.* Refiners with supplies of crude oil distant from their refineries commonly exchange crude oil with one

another in order to reduce transportation costs; such "barter transactions [are] necessary to everyday oil operations." App. A at 11a. Beginning long before 1960, refiners in California have used, *inter alia*, the "three-cut" method of accounting for exchanges involving crude oils having different qualities. App. C at 48a. In such so-called "three-cut exchanges," crude oil is accounted for on the basis of its yield of three products of atmospheric distillation, called "cuts"; roughly speaking, the three cuts are gasoline, diesel fuel, and residual fuel oil. *See* App. E at 77a-78a.

Respondents claimed that the alleged conspiracy to depress posted prices was hatched at a series of meetings held during 1961 and 1962 to discuss technical revisions in the measurement of the three distillation cuts. App. C at 32a. They further claimed that the purpose of the revised three-cut method was to permit the defendants to avoid using posted prices when trading crude oil, because "all the companies knew that posted prices were improper." App. A at 12a.

e. *The petitioners' operations in California.*

i. *Exxon.* Exxon's operations in California were restricted to the production and sale of crude oil from before 1965, when respondents claim Exxon joined a conspiracy to depress prices, until 1969, when Exxon began operating a refinery within the state. From 1961 through 1968, Exxon sold all of its production of California crude oil, more than 70 million barrels, at posted prices. ER 3878; Supp. ER 102-03, 118-31. Exxon therefore had an obvious interest in higher rather than lower prices.

In 1969, when it opened its new refinery, Exxon began phasing out its sales of California crude oil; from 1969 until 1975 Exxon refined most of its production of California crude oil or traded that crude oil for supplies located nearer its refinery. ER 2882-83; Clerk's Rec. 1299, Exh. 8. In the meantime, however, Exxon had made two

major discoveries of crude oil in California and Alaska that were expected to result in substantially increased production by 1971, Supp. ER 106-07, 133, 138-45, and "[w]ith these discoveries, Exxon . . . continued to be interested in higher prices." App. C at 39a.

By 1975, Exxon once again began selling California crude oil; as before, its sales were at posted prices. ER 2882-83; Supp. ER 177-78. Around this time Exxon considered closing its California refinery but decided to continue it in operation specifically in order to support the demand for crude oil and thereby help maintain higher prices for Exxon's increased production of crude oil on the West Coast. Supp. ER 141-44, 153.

ii. *Texaco.* Respondents themselves conceded that "Texaco was an exception" to their theory that "defendants had a strong incentive to keep crude prices low." ER 4111.

Although Texaco operated a modest-sized refinery within the state, Texaco's supply of crude oil in California substantially exceeded its refining requirements throughout the 1960s. ER 3882-83; Clerk's Rec. 1994, Exh. 5. As late as 1968 Texaco was turning down opportunities to buy California crude oil at posted prices, "forecast[ing] [a] long crude oil position through 1974." Supp. ER 2580. Instead of buying crude oil, Texaco needed "to secure outlets for [its] excess supply." Supp. ER 2576.

During the period from 1961 through 1974, Texaco sold more than 50 million barrels of California crude oil, all at posted prices. Supp. ER 2738. Texaco profited when posted prices increased and lost revenues when prices decreased. Supp. ER 2609-11. The increase in posted prices in 1969, for example, "increased the overall net gain to the company." Supp. ER 2611. Throughout the late 1960s and early 1970s, other defendants, in internal analyses of crude oil prices, independently con-

cluded that Texaco had "a clear self interest in higher postings," ER 4111, and "would benefit from a higher price on heavy crude." ER 1921.

According to respondents' own experts, a refiner with a self-sufficiency ratio above a break-even level would benefit from higher prices for crude oil. ER 4112-13. At the time the alleged conspiracy began and for years thereafter, Texaco's self-sufficiency ratio was well above that break-even level. ER 4111. Respondents conceded that their claim that the defendants "had low self-sufficiency ratios . . . and would clearly not have benefited from high crude prices" did not apply to Texaco. ER 79.

2. Proceedings below.

a. *In the district court.* Over the course of several years respondents took scores of depositions and examined hundreds of thousands of documents. App. C at 58a-59a. Once respondents had availed themselves of this "ample opportunity to obtain all of the evidence that they could expect to present at a trial," *id.* at 59a, the district court ordered them to file a pretrial brief setting forth, with preclusive effect, all the evidence on which they intended to rely. Each defendant then separately moved for summary judgment. Following eight days of "[c]omprehensive oral arguments," *id.* at 25a, the court granted summary judgment for all defendants, concluding that "[a]fter more than eight years of discovery, the plaintiffs simply do not have the evidence to prove the antitrust conspiracy that they allege." *Id.* at 31a.

The district court determined that respondents "do not have any testimony or documents that give direct support to their theory of conspiracy . . . [and] therefore have been obliged to seek circumstantial proof." *Id.* at 59a. After "ponder[ing] whether the record here developed contains enough facts upon which a reasonable jury could draw an inference of liability that would be

'exercised in the realm of probability, not speculation, surmise and conjecture,' " *id.* at 60a, the court concluded, "I am confident that it could not." *Id.* The court found that the defendants' conduct had been "in accord with the legitimate pursuit of independent interests" and that "in many instances, the actions of the defendants and the contemporaneous comments of their representatives are completely inconsistent with the existence of a conspiracy to maintain low prices for crude oil." *Id.* at 59a-60a.

The court rejected respondents' contention that the existence of a conspiracy could be inferred from the fact that posted prices remained relatively stable and uniform throughout much of the 1960s and early 1970s. The court observed that "[i]t is normally to be expected that competition will cause companies dealing in fungible or standardized commodities, such as crude oil, to charge or pay parallel prices," *id.* at 42a, and the court further noted that price postings actually had increased in response to the only sustained shortages of crude oil (in 1970 and 1973) that were revealed by the record. *Id.* at 35a, 41a-42a. By 1973, further price increases had been restrained by federal price controls. App. F at 89a.

The court also rejected respondents' contentions relating to three-cut exchanges and the meetings held to discuss such exchanges during 1961 and 1962, holding that "[t]he three-cut exchange practice . . . is not inherently anticompetitive," App. C at 48a, and finding that "[t]here is no indication from the documents or from the depositions or declarations of the participants at the meetings that there was any discussion with respect to posted prices." *Id.* at 49a.

Finally, the court determined on the basis of undisputed evidence that "it was not in the economic interest of *all* of the defendants to keep down the prices of crude oil, and for all of them to have joined in a conspiracy with such a goal would be quite surprising." *Id.* at 39a

(emphasis in original). Evaluating the evidence with respect to each defendant, considered individually, the court concluded that neither Exxon nor Texaco had a plausible motive to conspire to depress the price of California crude oil:

> a. *Exxon* was strictly a producer and seller of crude oil in California until its refinery at Benicia was completed in 1969. It sold large quantities of oil at posted prices, and if such prices had been too low, Exxon would have lost several millions of dollars . . . . The plaintiffs never have advanced a satisfactory explanation as to how any conspiracy to keep crude oil prices low logically would have included Exxon.
>
> b. The plaintiffs and their experts acknowledge that *Texaco* would not have been adversely affected by increases in crude oil prices in California during the relevant period. . . . Certainly, Texaco would not have been one of the defendants that "would be hurt . . . if competition broke out in this marketplace."

Id. at 39a-40a (emphasis in original). In short, there was an "absence of any apparent reason for Exxon and Texaco to have wanted to join [the alleged] conspiracy." *Id.* at 40a.

b. *In the court of appeals.* The Ninth Circuit reversed and remanded for trial. The court agreed that respondents had "provided no direct evidence [of] conspiracy," App. A at 11a, and held that "the agreement concerning the [three-cut] exchanges themselves cannot be flatly classified as a price-fixing arrangement." *Id.* at 9a. The court nevertheless reasoned that respondents had "provided evidence of circumstances that point to the existence of . . . a conspiracy." *Id.* at 11a. That circumstantial evidence, the court held, entitled respondents to go to trial against all the defendants.

Unlike the district court, the Ninth Circuit made no effort to evaluate the sufficiency of respondents' evidence

as it related to Exxon and Texaco, considered individually (even though the facts pertaining to them had been separately discussed at length in the defendants' joint brief on appeal). In particular, the court of appeals did not point to any evidence tending to rebut Exxon's and Texaco's demonstrations—and the district court's conclusion—that neither company had a rational economic motive for participating in a conspiracy to depress the price of crude oil. Instead, treating unsubstantiated conjecture as evidence, the court chastised the district court for "disregard[ing]" respondents' "*explanation* of [Exxon's and Texaco's] incentives to conspire, such as access to pipelines and long term refining plans." *Id.* at 14a (emphasis added).

The court did not pause to consider how this unsupported "explanation" could support a finding that either Exxon or Texaco had a plausible motive to conspire to depress prices. The court ignored respondents' concession that Exxon and Texaco, both at the time they were alleged to have joined the conspiracy and for years thereafter, did *not* have "strong economic incentives to hold heavy crude posted prices low." Appellants' Br. 22. The court simply asserted, without any citation to or basis in the record, that "the companies *all* recognized that artificially maintaining lower posted prices was in their best interests." App. A at 14a (emphasis added).

The court further held that respondents could carry their burden at trial simply by establishing that the defendants "*at least acted in conscious parallel.*" *Id.* at 11a (emphasis added). Apparently believing that parallel conduct, without more, is sufficient to support a finding of conspiracy, the court did not deem it necessary to consider whether Exxon's or Texaco's conduct was consistent with permissible competition.

REASONS FOR GRANTING THE WRIT

The decision below contravenes four basic principles of law established by this Court. The court of appeals:

1. Failed to evaluate the sufficiency of the evidence with respect to Exxon and Texaco, considered individually, as required by *United States v. United States Gypsum Co.*, 438 U.S. 422, 463 (1978);

2. Ignored the holdings of *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), and *First National Bank v. Cities Service Co.*, 391 U.S. 253 (1968), that an antitrust defendant may not be forced to trial in a circumstantial conspiracy case in the absence of evidence that will support a rational jury finding that it possessed a plausible economic motive to conspire;

3. Permitted plaintiffs to defeat summary judgment merely by offering rank speculation about defendants' motive to conspire rather than producing evidence that would support a rational finding of fact, as required by *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); and

4. Ruled that mere "conscious parallelism" is sufficient to support a finding of conspiracy, notwithstanding this Court's contrary holding in *Theatre Enterprises, Inc. v. Paramount Film Distributing Co.*, 346 U.S. 537, 540-41 (1954).

The goal of a nationally uniform rule of law is defeated when courts of appeals proceed, as the Ninth Circuit did in this case, as if controlling decisions of this Court simply do not exist.

The decision below not only contradicts established law but promises to have sweeping and deleterious consequences. Adherence to the principles disregarded by the Ninth Circuit is important to ensure that legitimate business activity is not needlessly deterred. Unless courts take a hard and discriminating look at the evidence relat-

ing to each defendant before allowing complex antitrust conspiracy claims to proceed to trial, there is serious danger that less sophisticated juries will assess treble-damage liability merely because a defendant had engaged in some parallel behavior or was involved in collaborative but legitimate and procompetitive dealings with other defendants.

Moreover, the proper use of summary judgment in complex antitrust cases is vital to the functioning of the federal courts. As this fifteen-year-old lawsuit aptly illustrates, such cases clog calendars and consume enormous amounts of judicial time and energy. Because the prospect of treble damages provides "special temptation for the institution of vexatious litigation," *Lupia v. Stella D'Oro Biscuit Co.*, 586 F.2d 1163, 1167 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979), it is critically important that summary judgment be available and be used as a tool for weeding out and disposing of factually unsupported and implausible conspiracy claims—if not against all defendants, then at least against some of them.

I. The Decision Below Conflicts With Decisions Of This Court Governing The Disposition Of Antitrust Conspiracy Cases On Summary Judgment

This case involves the interrelationship of three basic legal principles: (1) liability for participation in an antitrust conspiracy may only be "predicated on the knowing involvement of each defendant, *considered individually*," *United States Gypsum*, 438 U.S. at 463 (emphasis added); (2) an antitrust conspiracy case based upon circumstantial evidence, as this Court held in *Matsushita* and *Cities Service*, cannot be submitted to a jury unless there is sufficient evidence to support a finding that the defendants had a plausible motive to conspire; and (3) a plaintiff may not defeat summary judgment without adducing evidence "sufficient to establish the existence of [each] element essential to [its] case." *Celotex*, 477 U.S. at 322.

As applied to this case, these principles mean that a necessary (but not sufficient) condition for defeating summary judgment was evidence that would support a rational finding that Exxon and Texaco had a motive to conspire to fix low prices for the crude oil that they sold. The Ninth Circuit did not require such evidence, and there was none.

A. *United States Gypsum* states the bedrock principle that liability for participating in a conspiracy must be based on an assessment of the sufficiency of the evidence with respect to each particular defendant, "considered individually." Although that case addressed the standard to be applied by a jury, it is beyond question that a court must give the same careful and particularized consideration to the evidence on summary judgment: "[t]here is no issue [for trial] unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Liberty Lobby*, 477 U.S. at 249.

Other courts of appeals correctly understand that it is their responsibility, when reviewing antitrust conspiracy cases on summary judgment, to evaluate the evidence carefully as it relates to each defendant. *See, e.g., Dunnivant v. Bi-State Auto Parts*, 851 F.2d 1575 (11th Cir. 1988); *In re Japanese Elec. Prod.*, 723 F.2d 238, 311-14 (3rd Cir. 1983), *rev'd on other grounds sub nom. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Under the rule stated in *United States Gypsum* and applied by the other circuits, the court below was obligated to give careful and separate consideration of the evidence relating to Exxon and Texaco—especially in view of the district court's determination that neither had a plausible motive to conspire—regardless of the state of the evidence as to any other defendant. The Ninth Circuit's failure to undertake this particularized review of the evidence was clear error.

B. The Ninth Circuit's failure to assess the sufficiency of the evidence as it related specifically to Exxon and

Texaco was linked to a second major error of law. *Matsushita* and *Cities Service* hold that a defendant may not be forced to go to trial in a circumstantial conspiracy case in the absence of evidence that would support a rational finding that it had a motive to conspire. The Ninth Circuit cited those cases in passing but did not follow their teaching as to Exxon and Texaco.

1. In deciding "whether to grant summary judgment in an antitrust conspiracy case," *Matsushita*, 475 U.S. at 576, a court first must determine whether "the factual context renders respondents' claim implausible." *Id.* at 587. *See also id.* at 596-97. The Ninth Circuit failed to make such a determination with respect to either Exxon or Texaco, notwithstanding the facial implausibility of respondents' claim that sellers would conspire to depress their own prices.

Here, as in *Matsushita* itself, "the Court of Appeals did not take account of the absence of a plausible motive to enter into the alleged . . . conspiracy." *Id.* at 595. Instead, the Ninth Circuit explained that "[u]nlike *Matsushita*, this is not a case of legitimate price competition or an implausible predatory pricing scheme." App. A at 15a. (On rehearing, the court withdrew this statement without otherwise changing its opinion. *See* App. B at 23a.) But the principle stated in *Matsushita*, as other circuits have recognized, obviously extends to any and all cases of alleged antitrust conspiracy. *See, e.g., Consolidated Metal Prod., Inc. v. American Petroleum Inst.*, 846 F.2d 284, 295 (5th Cir. 1988); *Houser v. Fox Theatres Mgmt. Corp.*, 845 F.2d 1225, 1232-33 (3d Cir. 1988); *A & M Records, Inc. v. A.L.W. Ltd.*, 855 F.2d 368, 372 (7th Cir. 1988); *Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc.*, 824 F.2d 582 (8th Cir. 1987), *cert. denied*, 108 S. Ct. 707 (1988).

The proper interrelationship between the principles articulated in *United States Gypsum* and *Matsushita* is perfectly illustrated by *Apex Oil Co. v. DiMauro*, 822 F.2d 246 (2d Cir.), *cert. denied sub nom. Coastal Corp.*

v. Apex Oil Co., 484 U.S. 977 (1987). There, the Second Circuit conscientiously applied the teaching of *Matsushita* to each defendant, considered individually, in order to determine the propriety of summary judgment. After a careful evaluation of the evidence, the court found sufficient evidence to warrant trial against some defendants but affirmed the grant of summary judgment in favor of others, holding (1) that the evidence did not "tend to exclude" the possibility that one defendant had acted independently and (2) that other defendants had not been shown to possess a "plausible motivation . . . to have participated in the alleged scheme." *Id.* at 258-60.

The Ninth Circuit's decision in this case stands in sharp contrast to *Apex Oil*. The court below committed fundamental error by failing to consider whether the evidence with respect to Exxon and Texaco, considered individually, could support a rational finding that they had a plausible motive to conspire.

2. Had the Ninth Circuit examined the evidence, it would have been forced to conclude that respondents' claims with respect to Exxon and Texaco simply are not plausible. Exxon had sold 30 million barrels of California crude oil at posted prices between 1961 and 1965, when respondents claim that Exxon joined in the alleged conspiracy; Exxon then sold another 40 million barrels at posted prices between 1965 and 1968. Supp. ER 102-03, 118-31. This means, according to respondents' own theory, that by the time Exxon learned of the conspiracy it already had been victimized by as much as $28 million but that, instead of suing to recover treble damages or taking other countermeasures, Exxon joined the conspiracy at the cost of yet another $37 million. Respondents' theory also means that Texaco willingly undertook to lose millions of dollars: Texaco sold a total of 54 million barrels of California crude oil at posted prices *after* respondents claim that it participated in the organization of the alleged conspiracy. Supp. ER 2738. Exxon's and Texaco's participation in the conspiracy that respondents allege, there-

fore, "makes no economic sense." *Matsushita*, 475 U.S. at 587. If there had been such a conspiracy, Exxon and Texaco, no less than respondents themselves, would have been its victims.

So far as Exxon and Texaco are concerned, this case presents an exact parallel to *Matsushita*. The conspiracy alleged here, as in *Matsushita*, involved the purported setting of artificially low prices; Exxon and Texaco, like the Japanese manufacturers in *Matsushita*, were sellers of the commodity whose price allegedly was being depressed. In order to sell at predatory prices, the Japanese manufacturers in *Matsushita* would have had to accept heavy losses for many years in the mere hope of obtaining high profits in the distant future. This case is the same. Here, as in *Matsushita*, "petitioners had every incentive *not* to engage in the conduct with which they are charged." 475 U.S. at 595 (emphasis in original).

C. Instead of determining whether the evidence with respect to Exxon and Texaco, considered individually, would support a finding of a plausible motive to conspire, the Ninth Circuit, in a single perfunctory sentence, simply credited respondents' "*explanation* of the incentives to conspire, such as access to pipelines and long term refining plans, for Texaco and Exxon." App. A at 14a (emphasis added). The court thus treated the requirement of motive so cavalierly as, in effect, to disregard it altogether.

To avoid summary judgment, respondents were required "to make a showing sufficient to establish the existence of [each] element essential to [their] case," *Celotex*, 477 U.S. at 322, including motive to conspire. Accordingly, the Ninth Circuit was obligated to determine whether respondents' "explanation" was factually supported and could rationally sustain a jury finding that Exxon or Texaco had a motive to conspire to fix low prices despite its indisputable interest in higher prices. *Liberty Lobby*, 477 U.S. at 249. That duty was particularly acute

given the district court's conclusion—based on its extensive familiarity with and detailed analysis of the record—that respondents' evidence supplied no basis for such a finding. *See* App. C at 39a-40a. Had the Ninth Circuit discharged its duty, it would have found that the purported "explanation" of motive was rank speculation and economically nonsensical.

1. Respondents jump from the fact that the defendants used one another's pipelines to the conclusion that Exxon and Texaco were motivated to join a conspiracy that would cost them tens of millions of dollars. Yet, there is no evidence that the other defendants threatened to deny use of their pipelines or to charge higher rates unless Exxon or Texaco joined a conspiracy to depress the price of crude oil. Without evidence of such a threat, "there is no basis in fact and it would be unjust in principle to find a coerced conspiracy." 6 P. Areeda, *Antitrust Law* ¶ 1408 at 43 (1986). Furthermore, at the time respondents claim that Exxon joined the conspiracy, Exxon had no need for pipeline transport and did not anticipate having such need for several years; and the principal pipeline serving Exxon's refinery, once the need for transport did arise, was owned not by another defendant but by nondefendant Getty Oil Corporation, ER 4166-67—a company that respondents argue "was a victim of [the alleged] conspiracy." Supp. ER 4056. Beyond all that, it would take powerful affirmative evidence to show that companies with the sophistication and resources of Exxon and Texaco could be unlawfully coerced into sacrificing tens of millions of dollars instead of suing or exerting defensive counterpressures. Respondents furnished no such evidence.

2. Respondents speculate that Exxon might have been induced to join a conspiracy to depress its own selling prices in 1965 out of a belief that it could begin profiting from such a conspiracy in 1969, when its new refinery was scheduled for completion, and that Texaco joined

such a conspiracy in 1961 because it anticipated that a subsequent modernization of its refinery—a modernization that was not even in the planning stages in 1961—might give it an interest in lower prices for crude oil. That speculation is not supported by evidence, and it is as implausible as it is unfounded. No rational company would have joined a conspiracy in the circumstances in which Exxon found itself in 1965, or Texaco in 1961, when to do so would have resulted in years of unnecessary and avoidable threshold losses in the tens of millions of dollars.

II. The Decision Below Revives The Discredited Notion That Mere "Conscious Parallelism" Can Support A Finding Of Conspiracy

The Ninth Circuit began its analysis with the proposition that respondents may establish liability at trial merely by showing that the defendants "at least acted in conscious parallel to fix and post . . . artificially low prices." App. A at 11a. The court then proceeded to rest its decision squarely on "the doctrine of conscious parallelism." *Id.* at 13a. But the court's application of that doctrine, which apparently derived from a broad reading of *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939), represents serious error.

In *Theatre Enterprises*, this Court narrowly construed its earlier opinion in *Interstate Circuit*, noting with some asperity that " 'conscious parallelism' has not yet read conspiracy out of the Sherman Act." 346 U.S. at 541. "The crucial question," the Court explained, "is whether [the parallel] conduct . . . stemmed from independent decision or from an agreement." *Id.* at 540. Liability, therefore, quite plainly may *not* be predicated merely upon a finding that defendants "at least acted in conscious parallel." There must be evidence sufficient to support an inference of agreement. The Ninth Circuit, ignoring *Theatre Enterprises*, simply glossed over this essential point.

To support an inference of agreement, there must be, at the very least, parallel behavior plus both motive to conspire and conduct inconsistent with independent action and permissible competition. *See* P. Areeda and H. Hovenkamp, *Antitrust Law* ¶ 1412 (1989 Supplement). Proof of parallel behavior plus evidence of putatively low prices—the only evidence that the Ninth Circuit deemed necessary—does not provide a basis for finding that Exxon and Texaco had a plausible motive to conspire or engaged in conduct inconsistent with permissible competition.

A. Consciously parallel conduct, far from being unlawful in itself, cannot support even an inference of agreement in a "situation where the interests of the parties whose behavior was 'consciously parallel' were substantially divergent." *Cities Service*, 391 U.S. at 288. The reasoning of *Interstate Circuit*, as the Court explained in *Cities Service*, necessarily is confined to circumstances where defendants have congruent interests and similar economic motives. That is not the case here. Even had there been credible evidence that posted prices were below market value—a proposition rejected by the district court, App. C at 33a-38a—that would simply dramatize the divergence between Exxon's and Texaco's interests and those of the other defendants.

In the normal course, buyers prefer lower prices and sellers prefer higher prices. The Ninth Circuit ignored this obvious fact of life when it treated the defendants' divergent interests and motives as if they were one and the same. The court would permit evidence of parallel conduct and low prices to be transmuted into a finding that the very sellers who suffered as a result of those low prices were guilty of having conspired with buyers to inflict that harm upon themselves. That unjust result confounds common sense. And it flows directly from the Ninth Circuit's failure to observe the limitations that *Theatre Enterprises* and *Cities Service* place upon the doctrine of conscious parallelism.

B. Mere parallel conduct, such as engaging in three-cut exchanges, cannot support an inference of conspiracy where, as here, such conduct was entirely consistent with permissible competition. This Court held in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 760-64 (1984), and reaffirmed in *Matsushita*, that "conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy." *Matsushita*, 475 U.S. at 597 n.21. *See also id.* at 588. Moreover, because respondents failed to establish that either Exxon or Texaco had a rational economic motive to conspire, respondents bore the additional burden of "com[ing] forward with more persuasive evidence to support their claim than would otherwise be necessary," *id.* at 587—"evidence that is sufficiently unambiguous to permit a trier of fact to find that petitioners conspired to [depress crude oil prices] . . . despite the absence of any apparent motive to do so." *Id.* at 597.

The Ninth Circuit's holding that liability could rest on mere conscious parallelism conflicts squarely with both *Monsanto* and *Matsushita*. Respondents' evidence of parallel behavior, far from being "more persuasive" and "unambiguous," provides no basis whatsoever for an inference that Exxon or Texaco acted in a manner inconsistent with permissible competition.

1. Although the Ninth Circuit reasoned that "[t]he unusual effort put into the maintenance of the three-cut exchange system does constitute circumstantial evidence of conspiratorial price-fixing," App. A at 12a, at least as applied to Exxon and Texaco that conclusion was plainly incorrect.

There is no evidence that Exxon put *any* effort, let alone an "unusual effort," into "maintenance of the three-cut exchange system." To the contrary, Exxon did not attend and was not even aware of the meetings held

during 1961 and 1962 at which the other defendants revised the three-cut method of accounting for exchanges. Supp. ER 103-04, 246, 249, 4243. Exxon did not have occasion to engage in exchanges of California crude oil until it opened its California refinery in 1969. Exxon then began making such exchanges in order to reduce the cost of physically transporting crude oil from field to refinery. Supp. ER 183-86, 192-93. In making such exchanges, however, Exxon generally sought to avoid using the three-cut method, which it regarded as burdensome and administratively complex. Exxon normally used three-cut exchanges only when its exchange partner required it to do so. ER 2885-91; Supp. ER 183-93.

As for Texaco, although it used three-cut exchanges more extensively than Exxon and did attend some of the meetings held during 1961 and 1962, its use of such exchanges was precisely the opposite of respondents' theory of how a conspirator would have acted. Respondents contend that the whole purpose of the revised three-cut method was to avoid trading crude oil, especially heavy crude oil, at the allegedly depressed posted prices. App. C at 32a. In fact, however, after the 1961-62 meetings, Texaco traded away millions of barrels of heavy crude oil for light crude oil at posted prices, Supp. ER 2719-24; Clerk's Rec. 1944, Exh. 1—a practice that would have been irrational and self-defeating if respondents' allegations had been true.

The courts below recognized that three-cut exchanges are "not inherently anticompetitive," App. C at 48a, and "have . . . justifiable purposes." App. A at 9a. The Ninth Circuit's transformation of a legitimate industry practice into suspect "conscious parallelism" raises the "distinct possibility" that in the future "salutary and procompetitive conduct . . . might be shunned by businessmen who choose to be excessively cautious in the face of uncertainty regarding possible exposure . . . ." *United*

States Gypsum, 438 U.S. at 411. *See also, e.g., Weit v. Continental Ill. Bank & Trust Co.*, 641 F.2d 457, 459-66 (7th Cir. 1981), *cert. denied*, 455 U.S. 988 (1982).

2. The Ninth Circuit identified a purported "genuine issue of fact over whether shortages of heavy crude oil existed and should have caused an increase in posted prices." App. A at 12a. The court did not, however, analyze the relevance of this "genuine issue of fact" as applied to Exxon or Texaco, considered individually. For adherence to posted prices or alleged shortages of crude oil to be relevant to the question of conspiracy, there would have to be evidence of something more than mere parallel conduct; there would have to be evidence permitting a reasonable jury to find that Exxon or Texaco engaged in conduct inconsistent with independent action and permissible competition. There was no such evidence.

Although Exxon had anticipated the possibility that it might experience a shortage of heavy crude oil at its refinery in 1971, Exxon presented evidence that it had been able to avoid the forecast shortage by importing its own heavy Venezuelan crude oil at a delivered cost lower than the posted price for comparable California crude oil. Supp. ER 117. As the district court observed, "[t]here is nothing in the record to the contrary." App. C at 52a. Indeed, Exxon's general policy was to supply its refinery with its own crude oil, both foreign and domestic, Supp. ER 113-17, and there is no evidence that Exxon ever experienced an actual shortage of crude oil that should have led it to offer more than the posted price in order to buy California crude oil from third parties. Nor is there any evidence that Texaco ever even anticipated, let alone experienced, a shortage of crude oil at any time prior to the imposition of federal price controls; and after that time, neither buyers nor sellers were free to raise the price. *See* App. F at 89a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December, 1989

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-5859

D.C. Nos. CV-75-2232-WPG, CV-76-2839

CITY OF LONG BEACH, as trustee for
the State of California,
Plaintiff-Appellant,

v.

STANDARD OIL COMPANY OF CALIFORNIA; TEXACO, INCORPORATED; EXXON CORPORATION; UNION OIL COMPANY OF CALIFORNIA; MOBIL OIL CORPORATION; SHELL OIL COMPANY,
Defendants-Appellees.

STATE OF CALIFORNIA, on behalf of itself and all political subdivisions and special districts within the state similarly situated,
Plaintiff-Appellant,

v.

STANDARD OIL CO., *et al.*,
Defendants-Appellees.

No. 86-5860

D.C. No. CV-82-3252-WPG

CITY OF LONG BEACH,
Plaintiff-Appellant,

v.

STANDARD OIL CO., *et al.*,
Defendants-Appellees.

IN RE: COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRODUCTS ANTITRUST LITIGATION—MDL 150.

Appeals from the United States District Court
for the Central District of California
William P. Gray, District Judge, Presiding

Argued and Submitted
October 4, 1988—San Francisco, California

Filed April 17, 1989

Before: Mary M. Schroeder, Jerome Farris and
Cecil F. Poole, Circuit Judges.

Opinion by Judge Farris

Shirley M. Hufstedler, Hufstedler, Miller, Carlson & Beardsley; Royce H. Schulz and Gary L. Halling, Broad,

Schulz, Larson & Wineberg; Gary W. Hoecker and M. Brian McMahon, Hoecker, McMahon & Wade, Los Angeles, California, for the plaintiffs-appellants City of Long Beach and State of California.

John R. Calhoun, City Attorney, and James N. McCabe, Deputy City Attorney, City of Long Beach, Long Beach, California, for the plaintiff-appellant City of Long Beach.

John K. Van de Kamp, Attorney General, Sanford N. Gruskin, Assistant Attorney General, Richard N. Light, Deputy Attorney General, State of California, for the plaintiff-appellant State of California.

Andrew J. Kilcarr and Maureen O'Bryon, Hogan & Hartson, Washington, D.C.; Charles F. Rice, New York, New York, for the defendant-appellee Mobil Oil Corporation.

Anthony P. Brown, Philip L. Judson, Paul R. Griffin, and Craig E. Stewart, Pillsbury, Madison & Sutro, San Francisco, California, for the defendant-appellee Chevron Corporation.

Philip K. Verleger and David A. Destino, McCutchen, Black, Verleger & Shea, Los Angeles, California; Kenneth P. Fountain, Houston, Texas, for the defendant-appellee Exxon Corporation.

John S. Kingdon and Alan M. Grimaldi, Howrey & Simon, Washington, D.C.; Raymond V. McCord, Los Angeles, California, for the defendant-appellee Shell Oil Company.

Milton J. Schubin, Barry Willner and Aton Arbisser, Kaye, Scholer, Fierman, Hays & Handler, New York, New York; Robert D. Wilson, White Plains, New York, for the defendant-appellee Texaco, Inc.

Darryl Snider, Henry J. Kupperman, Scott J. Koepke and Michael W. Biren, Brobeck, Phleger & Harrison, and

Harold E. Zohner, Los Angeles, California, the defendant-appellee Union Oil Company.

OPINION

FARRIS, Circuit Judge:

The City of Long Beach and the State of California appeal the district court's grant of summary judgment to the defendants, six major California oil companies.[1] The city charged the companies with conspiring to depress the posted price of crude oil in violation of federal and state antitrust laws.[2] The record satisfies us that the plaintiffs presented sufficient evidence to establish genuine issues of material fact in support of their claims. We reverse and remand for trial.[3]

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[1] The defendants-appellees are Standard Oil Co. of California (now Chevron Corp.), Exxon Corp. (formerly Humble Oil & Refining Co.), Mobil Oil Corp., Shell Oil Co., Texaco, Inc., and Union Oil Co. of California. The seventh defendant, Atlantic Richfield Co., settled with plaintiffs and was dismissed from these suits on December 13, 1984.

[2] Three consolidated cases are involved in this appeal. D.C. No. CV-75-2232 was filed in June 1975 by the City of Long Beach; counts one and two of the second amended complaint alleged antitrust violations in the defendants' purchase of oil produced from lands owned in trust by the city for the benefit of the State of California. D.C. No. CV-76-2839 is a class action suit by the State of California on behalf of itself and its political subdivisions; the fifth cause of action of the second amended complaint alleged a conspiracy to depress crude oil prices and was severed and consolidated with No. 75-2232. The district court certified its summary judgment award on the antitrust claims as final under Fed. R. Civ. P. 54(b).

D.C. No. CV-82-3252 was filed by the City of Long Beach in June 1982 and alleged federal and state antitrust claims for oil produced from lands owned by the city in its proprietary capacity, as opposed to as trustee.

We have jurisdiction pursuant to 28 U.S.C. § 1291.

[3] We also decide today in a separate opinion an appeal from the district court's award of summary judgment against the city

BACKGROUND

The City of Long Beach, both as trustee for state lands and as proprietor, owns oil produced from the Wilmington Oil Field. *See* 1964 Cal. Stats., Ch. 138 (1st Extra. Sess.). The field extends 11 miles southeast from the Wilmington District of Los Angeles through Long Beach Harbor and the offshore area of the City of Long Beach. Production from the 7,825 acre onshore portion began in the 1930's. In 1954, the city planned and supervised a seismic survey to determine the extent of the southeasterly offshore portion of the field. Problems with land subsidence arising from the onshore production delayed development of the offshore oil. In February 1962, after the preparation of a comprehensive development plan by the Harbor Department, city voters approved offshore drilling. The California State Lands Commission approved the city's proposal to develop the 6,400 acre offshore area in late 1964.

In order to develop and market the oil from the 1.5 billion barrel field, in March 1965 the city sold interests in its production. The interests were awarded for a 35-year period based on bids for a percentage of the expected market price of the oil. A consortium composed of five of the companies (Texaco, Exxon, Union, Mobil, and Shell) obtained an 80% share, which also obligated the group to perform day-to-day operations as Field Contractor. Chevron and ARCO jointly obtained shares totalling 10% of production. The remaining 10% share went to companies not involved in this litigation. The winning bids ranged from 95.56% for the Field Contractors' share to 100% for a 5% share won by Chevron and ARCO.

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on the pendent state contract claims included in the complaint filed in D.C. No. CV-75-2232. *City of Long Beach v. Standard Oil Co.*, —— F.2d —— (9th Cir. 1989). That opinion also considers the removal of state law claims, originally filed in state court in 1986, concerning a later time period.

A Contractors' Agreement, executed by the parties in March 1965 after two years of preparation and discussion, contained detailed pricing provisions for the oil sold to the companies.[4] The price was based substantially upon the arithmetical average of prices "posted" during the month by major purchasers in the Wilmington field and other named fields. Posted prices are prices that a prospective purchaser publicly declares it is willing to pay for crude oil. Chevron, ARCO, Mobil, and Union were the only purchasers to regularly post prices in the Wilmington field.

In 1975, the City of Long Beach and the State of California brought suit against seven major California oil companies charging violations of federal and state antitrust statutes. The city alleges that the companies conspired to fix and maintain uniform, noncompetitive posted prices for the kind of crude oil produced from the Wilmington field, and that those postings were below the prices that buyers in a free, open market would have paid.

The district court granted summary judgment on several alternative grounds. On July 19, 1984, the court entered partial summary judgment for the companies for the period April 12, 1972 to October 1, 1976, concluding that federal price controls supplanted the alleged conspiracy as the effective reason for the crude oil price levels. On December 17, 1984, the court entered partial summary judgment for the period November 1, 1974 through 1977, based on the federal Entitlements Program's effect on the value of the city's oil. On September 19, 1985, the court entered a complete summary judgment for the companies. The court found that the federal Mandatory Oil Import Program precluded recovery for the remaining period of alleged liability, June

[4] A more detailed discussion of the pricing provisions is contained in our companion opinion on the contract claims.

27, 1971 to April 12, 1972, and as an alternative ground that the city had failed to present sufficient evidence to prove the alleged antitrust conspiracy.

We review the district court's grant of summary judgment de novo. *Harkins Amusement Enterprises, Inc. v. General Cinema Corp.*, 850 F.2d 477, 482 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 817 (1989). To overcome summary judgment the non-moving party "must establish that there is a genuine issue of material fact" and demonstrate more than "some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Id.* at 587 (citing *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289 (1968), Fed. R. Civ. P. 56(e)).

In reviewing the summary judgment motion we accept the city's undisputed allegations as true:

(1) The California oil market is isolated and dominated by the defendant companies. This dominance encompasses the production, transportation, and refining sectors of the industry.

(2) The posted prices for heavy crude oil generally were stable throughout the period of the alleged conspiracy (1961-1977). Price increases did occur in 1969, 1970, and 1973.

(3) The composition of crude oil varies. Heavier-weight crudes generally are less desirable for refinery feed stock than lighter-weight crudes. For a given refinery configuration, the lighter-weight crude can be refined into a larger volume of more valuable "light" products (i.e., gasoline as opposed to fuel oil). Alternatively, a greater capital investment in refinery equipment is required to produce light products from a heavy crude. As a result of this difference in value, lighter weight crude generally is more expensive than heavier weight oil.

Crude oil weight is measured on gravity scale in degrees. The difference in price for crude oils of varying weights on a posted price schedule is known as the "gravity price differential." The oil owned by the city was a heavy crude.

(4) The companies engaged in barter transactions, called three-cut exchanges, to move oil from fields to refineries as efficiently as possible. The accounting for the substantial volumes of oil traded in three-cut exchanges was not done on the basis of posted prices, but on refinery product yields adjusted to balance volumes.

(5) In 1961-62, employees of five out of the six defendant companies met to discuss and revise the technical specifications for the three-cut exchanges. The parties disagree over whether the meetings were secret and whether the city was aware of the widespread use of three-cut exchanges.

DISCUSSION

A. Legal Standard

Section 1 of the Sherman Act declares illegal "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce . . . ." 15 U.S.C. § 1. Section 4 of the Clayton Act allows any person "injured in his business or property by reason of anything forbidden in the antitrust laws [to] recover threefold the damages by him sustained. . . ." 15 U.S.C. § 15(a).

To maintain a successful action, the city must show a contract, combination, or conspiracy that restrains trade and causes harm to itself and to competition in general. *See Matsushita*, 475 U.S. at 586; *Christofferson Dairy, Inc. v. MMM Sales, Inc.*, 849 F.2d 1168, 1172 (9th Cir. 1988); *see also USA Petroleum Co. v. Atlantic Richfield Co.*, 859 F.2d 687, 697 (9th Cir. 1988) (concluding that injury done to market and to competitors by vertical, non-predatory, maximum price-fixing conspiracy is antitrust injury). The city must present "direct or circum-

stantial evidence that reasonably tends to prove . . . a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 768 (1984). Although conspiracy may be inferred from circumstantial evidence, the evidence must tend to exclude the possibility that the defendants acted independently and lawfully. *Id.* at 763-64; *Wilcox v. First Interstate Bank of Oregon, N.A.*, 815 F.2d 522, 525 (9th Cir. 1987). In analyzing the evidence at the summary judgment stage of an antitrust action, "plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *See Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) (remanding for new trial); *Wilcox*, 815 F.2d at 526.

The city claims that the three-cut exchange agreement is unlawful *per se*. Whatever the effect of the three-cut exchanges on posted prices, the agreement concerning the exchanges themselves cannot be flatly classified as a price-fixing arrangement. *Cf. Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 349-51 (1982). On their face, the three-cut exchanges cannot be held to have a single purpose of stifling competition. As explained below, the exchanges have other justifiable purposes, and so should be scrutinized under the Rule of Reason. *See Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 19-20 (1979); *Coastal Transfer Co. v. Toyota Motor Sales, U.S.A.*, 833 F.2d 208, 211 (9th Cir. 1987); *see also Business Electronics Corp. v. Sharp Electronics Corp.*, 108 S. Ct. 1515, 1519-20 (1988).

B. The Conspiracy

The city claims that the companies violated the antitrust laws by conspiring to maintain an artificially low posted price for Wilmington oil. The city alleges that the companies accomplished this by using three-cut exchanges

and artificially high gravity price differentials to maintain a dual price structure. Posted prices allegedly were kept low to reduce the companies' payments to the city for the publicly-owned Wilmington oil, while the companies used three-cut exchanges to maintain market values in transactions among themselves. The city further alleges that in the absence of this anticompetitive behavior, market forces would have increased the price of the Wilmington oil. More specifically, the city asserts that:

1) In their posted prices, the defendants systematically undervalued heavy crude oils, resulting in the underpricing of the city's oil.

(2) The gravity price differentials for the companies' posted prices were artificially large in comparison to the value of the oil in the market place, resulting in the underpricing of the city's oil.

(3) The purpose of the three-cut exchange was to escape the problematic consequences of the deliberate underpricing in posted prices of the city's oil. The three-cut exchanges enabled the companies to trade crude oil at market value and avoid the market distortions caused by the artificially low posted prices.

(4) The 1961-62 technical meetings were held secretly to further this purpose.

(5) The companies operated their private pipelines, adhered to posted prices, exchanged price information, and set the gravity price differentials for Alaska Cook Inlet oil in a manner that assisted their policy of underpricing heavy California oil.

(6) The companies experienced shortages of heavy crude oil in California such that, in an open market, higher prices would have resulted.

(7) The refinery value of various crude oils—that is, the dollar value of the products obtained from processing

a given barrel of oil in a particular refinery—is material to the pricing issues raised by the antitrust claims.

(8) The federal Mandatory Oil Import Program, in effect from 1959-73, did not prevent the companies from increasing oil prices.

(9) Neither federal price controls, first imposed in 1971, nor the federal Entitlements Program, implemented in 1974 to correct inequities among refiners using controlled-price crude oil versus exempt or imported oil, caused the alleged depressed price for the city's oil.

To prove its case at trial, the city must convince the trier of fact that the companies conspired, or at least acted in conscious parallel, to fix and post artificially high gravity price differentials resulting in the city's receiving artificially low prices for its crude. The city has provided no direct evidence that such a conspiracy or conscious parallelism occurred. However, it has provided evidence of circumstances that point to the existence of such a conspiracy.

The record shows that the companies widely used the three-cut exchange system as an alternative to valuing barter transactions at posted prices. The companies held meetings in 1961 and 1962 to ensure that the three-cut exchange system more accurately reflected the value of the crude to the bartering parties. The record also shows that the three-cut exchange system was cumbersome and inconvenient to maintain. The city alleges that the companies used such a technically intricate system, rather than valuing the crude at posted prices, because the posted prices for heavier crudes were fixed to cheat sellers of crude. Although the parties agree that barter transactions were necessary to everyday oil operations, the city argues that the three-cut exchange system enabled the companies to value the crude bartered among themselves in a manner that avoided the rigged posted prices. The city cites the companies' efforts to maintain the three-

cut exchange system as evidence that all the companies knew the posted prices were improper. The unusual effort put into the maintenance of the three-cut exchange system does constitute circumstantial evidence of conspiratorial price fixing.

When only circumstantial evidence of a conspiracy is offered, a defendant is entitled to summary judgment if it provides a plausible and justifiable alternative interpretation of its conduct that rebuts the alleged conspiracy. *T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Assoc.*, 809 F.2d 626, 632 (9th Cir. 1987). For example, parallel changes in prices and exchanges of price information by competitors may be motivated by legitimate business concerns. *See Wilcox*, 815 F.2d at 526-27. The companies explain, with support in the record, that the three-cut exchanges had been ongoing, the 1961-62 meetings were held to address valid technical issues only tangentially related to pricing, and the posting system itself was lawful.

The city presents evidence to rebut the companies' explanation for their conduct. The three-cut exchanges were cumbersome and inconvenient. At various times, market conditions should have caused some of the companies to post higher crude prices. Posted prices often did not correspond to market value. At least one company acknowledged that an increase in the posted price would result in increased payments to Long Beach. A question also is raised by ARCO's requirement that it be indemnified for potential liability to the city arising from use of the three-cut exchanges.

The city raises a genuine issue of material fact over whether shortages of heavy crude oil existed and should have caused an increase in posted prices. The district court incorrectly concluded that the city's evidence related only to anticipated shortages. It also erred in relying on a 1978 statement to Congress by the California Comp-

troller that a surplus of domestic crude existed in the region. The statement is largely irrelevant to this suit because it was made after the July 1977 entry of Alaska North Slope oil into the California market.

The district court found that the city's analysis of marginal refinery values had no significance. Although the questions raised by the district court would be valid cross-examination, the refinery value analysis is relevant, material evidence. It would assist the trier of fact in the search for truth, Fed. R. Evid. 702, and its probative value is not outweighed by the danger of misleading the jury, Fed. R. Evid. 403. Given the companies' dominance of the market, the analysis is critical in proving damages. *See Shad v. Dean Witter Reynolds, Inc.*, 799 F.2d 525, 529-30 (9th Cir. 1986) (finding introduction of expert opinion essential); *compare McGlinchy v. Shell Chemical Co.*, 845 F.2d, 802, 806-807 (9th Cir. 1988) (finding expert opinion properly excluded because based on unsupported assumptions and flawed analysis).

Under the doctrine of conscious parallelism, an agreement may be inferred if each participant knew that concerted action was contemplated and invited, gave its adherence to and participated in the scheme, and understood that cooperation was essential to the plan. *Barry v. Blue Cross of California*, 805 F.2d 866, 869 (9th Cir. 1986) (citing *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939)). The record shows that the companies were aware of the disparity between posted prices and three-cut exchange values and of the disparity between the posted prices and refining values for heavy crude oils. Each knew that the participation of all the companies was necessary to make the plan work, and, with the exception of Exxon, actively participated in the meetings to maintain the utility of the three-cut exchanges. Each engaged in three-cut exchanges. Because the companies dominated the relevant market, each understood the necessity of cooperation. *See Barry*, 805

F.2d at 869 (knowledge that cooperation is essential shown by oligopolistic market structure); *see also* Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 Stan. L. Rev. 1562, 1575-1587 (1969) (viewing noncompetitive pricing by oligopolists as collusive and § 1 of Sherman Act as appropriate remedy).

Additionally, the district court recognized that four of the six companies—Chevron, Union, Mobil, and Shell—had substantial incentives to conspire. The district court disregarded the city's explanation of the incentives to conspire, such as access to pipelines and long term refining plans, for Texaco and Exxon. The record shows that the companies all recognized that artificially maintaining lower posted prices was in their best interests. Whether this evidence will support at least an inference of an agreement among the companies is a question for the trier of fact.

Genuine issues of material fact exist over the effect of the Mandatory Oil Import Program on oil prices from 1959-1973. The program's primary purpose was to promote national security by encouraging domestic oil production. Presidential Proclamation No. 3279, 3 C.F.R. 11 (1959-63 Comp.); *see Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 552 (1976). The companies argue that crude prices were low because the import program also sought to stabilize domestic crude oil prices. The record contains significant, persuasive evidence that the import program was not intended to prevent crude oil prices from rising and would have allowed the price for the city's oil to increase.

Genuine issues of material fact exist with regard to the Entitlements Program. The program aimed to increase the cost to refiners of controlled oil, such as the city's, to roughly equal the cost of uncontrolled oil. Long Beach has shown that the controlled price for the city's oil may have been greater in the absence of the conspir-

acy. Therefore, the program does not excuse the companies from potential antitrust liability. However, we recognize that the existence of the Entitlements Program may affect potential damages significantly.

The city has raised genuine issues of material fact. It has presented significant evidence of an antitrust conspiracy that tends to exclude the possibility of independent action. An inference of collusive action reasonably and plausibly may be made based on the evidence presented. Unlike *Matsushita*, this is not a case of legitimate price competition or an implausible predatory pricing scheme. *Cf.* 475 U.S. at 588-595. A trier of fact must evaluate the substantial evidence in the record in support of the city's antitrust claim.

C. *Price Controls and Legal Injury*

The district court barred the Long Beach claims because during all but a few months of the damage period, it found that federal price control programs, and not the companies' actions, were the legal cause of the alleged injury—underpriced crude oil. Because Long Beach had no right to receive prices greater than the federal ceiling price for its oil, the court found that it had suffered no legal injury and therefore had no claim for relief.

Long Beach argues that the companies conspired to set an artificially low price for crude oil, and in the absence of that conspiracy, the price controls imposed by the federal government after the conspiracy began would have had a higher ceiling. The companies respond that the crude oil prices were limited by the federal government with full knowledge of the allegation that they were too low, and therefore the federal government, and not the companies, was the "supervening" legal cause of any injury suffered by Long Beach. The companies make the ambitious claim that, as a matter of law, they should be shielded from antitrust liability because the low prices of

which Long Beach complains were set by a government agency.

The district court made detailed findings of fact on the relationship between the price control program and the companies' prices for crude oil. The court found that price control administrators had rejected, at several points beginning on April 12, 1972, the arguments of California producers that crude oil prices were too low. The court concluded that even if Long Beach could prove a price-fixing conspiracy, as a result of the actions of federal price control administrators from April 12, 1972, until October 1, 1976, Long Beach had no right to any damages. The court reasoned that the city suffered no legal injury because the companies paid the city all that the law allowed, and therefore should not be liable for any additional amounts. We understand but reject the argument.

The establishment of price ceilings by the federal government, after the alleged conspiracy began, does not in itself mean that the companies' conduct could not have caused the injuries. If unlawful underpricing did occur, the harmful effects continued. If historical prices had been higher, the ceiling prices might have been higher "but for" the alleged conspiracy. *See Woods Exploration and Production Co. v. Aluminum Co. of America*, 438 F.2d 1286, 1292-98 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972). *Woods* was a federal antitrust action in which the plaintiffs charged that the defendants filed false natural gas production forecasts with the Texas Railroad Commission in order to reduce the production allowances for the plaintiffs. The district court granted partial summary judgment for the defendants on the ground that the plaintiffs were not entitled to recover damages, because the Texas Railroad Commission, and not the defendants, set the allowances. The Fifth Circuit reversed and remanded for trial, stating that because the Commission's actions were based on false informa-

tion, liability existed. *Id.* at 1295-98; *see also City of New Orleans v. United Gas Pipe Line Co.*, 517 So. 2d 145, 156 (La. App. 1987), *cert. denied*, 109 S. Ct. —— (1988) (holding delivery obligations under gas contract not superseded by federal orders because company's earlier failures to obtain supplies caused problem). In this case, if the price ceilings were based on prices set artificially low as a result of an unlawful conspiracy, liability should still exist.

The companies incorrectly characterize the price control program as a supervening or superseding cause of the injury to the city. The city does not argue that the companies conspired to influence the price control program or that the price control program was the cause of its injury. *Cf. United Mine Workers v. Pennington*, 381 U.S. 657, 670-71 (1965) (no antitrust liability for joint efforts to influence government officials or for injuries resulting from related action by government official); *Okefenokee Rural Electric Membership Corp. v. Florida Power & Light Co.*, 214 F.2d 413, 418 (5th Cir. 1954) (no antitrust liability for injuries resulting from valid government action denying construction permit). Mere ratification by government officials does not absolve an otherwise illegal conspiracy. *See Woods*, 438 F.2d at 1298. If Long Beach can persuade a fact-finder that the price of crude oil would have been set at a different level but for the allegedly illegal agreement, it is entitled to damages. It overcomes summary judgment in presenting sufficient evidence to raise a genuine issue of material fact as to whether price controls would have been set at a different level in the absence of the alleged conspiracy.

A related question is whether the setting of price ceilings under the authority of the Economic Stabilization Act effectively should shelter the companies from antitrust liability for conduct not specifically approved by the act. *See Petroleum Products Antitrust Litigation*, 830 F.2d 198, 201 (Em. App.), *cert. denied*, 108 S. Ct. 466

(1987). In other words, does federal price regulation displace private antitrust regulation? If a substantive, comprehensive regulatory scheme exists, the Court has found that the private damages provisions of the antitrust laws are not an available remedy. *See Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 422 (1986) (citing *Keogh v. Chicago and N.W. Ry. Co.*, 260 U.S. 156 (1922)).

The district court's analysis implies that during a period of price controls, antitrust claims involving conspiracies to underprice, such as predatory pricing or the alleged agreement in this case, may not be pursued in the courts. For a regulatory program, such as price controls, to displace an antitrust claim the relief desired must be available from the regulatory agency. *Barnes v. Arden Mayfair, Inc.*, 759 F.2d 676, 679 (9th Cir. 1985) (citing *Keogh*). An exemption will be implied if necessary to give the regulatory statute full effect. *Barnes*, 759 F.2d at 679; *Foremost International Tours v. Quantas Airways Ltd.*, 525 F.2d 281, 284 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976); *see* Areeda & Turner, *Antitrust Law*, ¶ 224 (1978). Unless the conflict between the regulatory decision and antitrust liability is obvious, as with comprehensive ICC regulation of railroad rates and practices, the Court will not find an implied repeal of the antitrust laws. *See* Von Kalinowski, *Antitrust Laws & Trade Regulation* § 44A.02[2] (1988). If the challenged activity is beyond the scope of the regulatory body, no exemption will be found. *Barnes*, 759 F.2d at 679.

Implied repeals of the antitrust statutes are disfavored, and require a convincing showing that the antitrust laws and the regulatory program cannot coexist. *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*, 452 U.S. 378, 388-89 (1981). Long Beach points to substantial administrative and legislative history that tends to show that the price control

statutes were not intended to supplant the antitrust statutes. Additionally, the 1973 Emergency Petroleum Allocation Act, which continued price controls on crude oil, contained a provision prohibiting any construction of its provisions that would create any defenses to antitrust actions. Pub. L. No. 93-159, § 6 (1973), 15 U.S.C. § 755(c) (provision effective from 1973-1975, repealed by § 453, Energy Policy and Conservation Act, Pub. L. No. 94-163 (1975)); *see Typhoon Car Wash, Inc. v. Mobil Oil Corp.*, 770 F.2d 1085, 1089-90 (Em. App.), *cert. denied*, 474 U.S. 981 (1985).

The price ceilings set by the government were based on prices in effect at the time controls were imposed. The price control administrators did not examine the antitrust claims of the city. No independent analysis, comparable to the ratemaking in *Keogh*, was performed. Without such an independent analysis, the government's actions do not immunize the companies from civil antitrust liability. *See Foremost International Tours*, 525 F.2d at 285-87; Areeda, *supra*, at ¶¶ 224, 225. The existence of price controls will affect the determination of potential damages but does not absolve the companies of antitrust liability.

CONCLUSION

Long Beach presented sufficient evidence to raise genuine issues of material fact in support of its conspiracy claims, and to overcome the defenses that the Mandatory Oil Import Program, the Entitlements Program, or federal price controls were the cause of the alleged depressed price for its crude oil.[5]

REVERSED and REMANDED for trial.

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[5] In *Petroleum Products Antitrust Litigation*, 830 F.2d 198 (Em. App.), *cert. denied*, 108 S. Ct. 466 (1987), the Temporary Emergency Court of Appeals considered an interlocutory appeal by the city of the partial summary judgment dismissing the antitrust

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claims beginning April 12, 1972, because of the effect of federal price controls. TECA ruled that the issues raised were nonjusticiable until the underlying antitrust liability was resolved. *Id.* at 203. TECA noted that two issues were potentially within its sphere of authority, and could be appealed to it if and when justiciable:

> A. Whether or not 6 C.F.R. Sec. 101.34(a)(2), which exempted state and local governments from price controls under certain circumstances, applied to sales of "net profits oil" by appellants during the periods April 12, 1972 to June 13, 1973, and August 19, 1973 to October 25, 1973?
>
> . . .
>
> C. Whether or not compliance with Phase III price controls was "voluntary" during the period of January 11, 1973 to June 13, 1973 so that appellees were not prohibited from making appropriate price adjustments for the crude oil sold by appellants during this period?

Id. at 200, 203. We did not consider the above issues, and express no opinion on the appropriate time for the parties to raise them with TECA.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-5859

D.C. Nos. CV-75-2232-WPG, CV-76-2839

CITY OF LONG BEACH, as trustee for the State of California,

Plaintiff-Appellant,

v.

STANDARD OIL COMPANY OF CALIFORNIA; TEXACO, INCORPORATED; EXXON CORPORATION; UNION OIL COMPANY OF CALIFORNIA; MOBIL OIL CORPORATION; SHELL OIL COMPANY,

Defendants-Appellees.

STATE OF CALIFORNIA, on behalf of itself and all political subdivisions and special districts within the state similarly situated,

Plaintiff-Appellant,

v.

STANDARD OIL CO., *et al.*,

Defendants-Appellees.

No. 86-5860

D.C. No. CV-82-3252-WPG

CITY OF LONG BEACH,
Plaintiff-Appellant,

v.

STANDARD OIL CO., *et al.*,
Defendants-Appellees.

IN RE: COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRODUCTS ANTITRUST LITIGATION—MDL 150.

Nos. 87-6300/6629

D.C. No. CV-86-1771-WPG

PEOPLE OF THE STATE OF CALIFORNIA; CITY OF LONG BEACH, as Trustee for the State of California, and the State of California as Beneficiary,
Plaintiffs-Appellants,

v.

CHEVRON CORPORATION; UNOCAL CORPORATION; MOBIL OIL CORPORATION; SHELL OIL COMPANY; SHELL CALIFORNIA PRODUCTION, INC.; EXXON CORPORATION; EXXON COMPANY, USA; TEXACO, INC.,
Defendants-Appellees.

Nos. 87-6301/6628

D.C. No. CV-75-2232-WPG

IN RE: COORDINATED PRETRIAL PROCEEDINGS IN THE PETROLEUM PRODUCTS ANTITRUST LITIGATION.

CITY OF LONG BEACH, as trustee for the State of California, and the State of California as beneficiary,
Plaintiff-Appellant,

v.

STANDARD OIL COMPANY OF CALIFORNIA, *et al.*,
Defendants-Appellees.

Filed September 22, 1989

Before: Mary M. Schroeder, Jerome Farris and Cecil F. Poole, Circuit Judges.

ORDER

The opinion filed April 17, 1989 in 86-5859/5860, *Long Beach v. Standard Oil*, is amended by striking the following language at page 3934 of the slip opinion, second full paragraph, lines 5-7: "Unlike *Matsushita*, this is not a case of legitimate price competition or an implausible predatory pricing scheme. *Cf.* 475 U.S. at 588-595." and substituting therefor, "*See Matsushita*, 475 U.S. at 588-595." With this amendment, the panel has voted to deny appellants' petitions for rehearing and to reject the suggestions for rehearing en banc.

The full court was advised of the amendment to the opinion and the suggestions for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the non-recused active judges in favor of en banc consideration. (Fed. R. App. P. 35.)

The opinion in 86-5859/5860 is amended as set forth above, the petitions for rehearing are denied and the suggestions for rehearing en banc are rejected.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MDL Docket No. 150

LONG BEACH

CV 75-2232-WPG

IN RE: COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRODUCTS ANTITRUST LITIGATION

MEMORANDUM OF DECISION GRANTING DEFENDANTS' SUMMARY JUDGMENT MOTIONS REGARDING ANTITRUST CLAIMS

[Filed Sept. 19, 1985]

The respective defendants,* individually and collectively, have filed motions for summary judgment that would deny any and all recovery to the plaintiffs growing out of their allegations of conspiracy to depress the prices of crude oil paid by the defendants to the plaintiffs. The motions and the plaintiffs' opposition have been thoroughly briefed and documented. Comprehensive oral arguments were heard on April 1-4 and April 8-11, 1985, and the matters were taken under submission. On June 19, 1985, this court filed a Judgment granting such motions. The bases for such summary judgment are contained in this Memorandum.

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* The defendants are Exxon Corporation, Mobil Oil Corporation, Shell Oil Company, Standard Oil Company of California, Texaco, Inc., and Union Oil Company of Califoria.

Governmental Action Precludes Recovery. The period of alleged liability runs from June 27, 1971, the earliest date allowed by the statute of limitations, and extends through 1977, the end of the damage period. This court previously has ruled that federal price controls preclude recovery during the entire period between April 12, 1972, and October 1, 1976. The plaintiffs' claims also were ordered dismissed for the remainder of the damage period, to the extent that the claimed appropriate competitive prices exceeded the increased price ceiling. (Memorandum of Decision filed July 17, 1984.) This court also has ruled previously that the Entitlements Program of the Federal Government prevents any recovery of damages attributable to the alleged reduced prices paid by the defendants for lower-tier controlled oil from November 1, 1974, to the end of the damage period. (Memorandum of Decision and Partial Summary Judgment filed December 13, 1984.)

Thus, only the early part of the period of alleged liability, the time between June 27, 1971, and April 12, 1972, is not covered by one or both of the earlier decisions. The court now concludes that recovery of damages allocable to such period is precluded by the presence and administration of the Government's Mandatory Oil Import Program (MOIP).

An Effective Purpose Of The MOIP Was To Prevent The Crude Oil Price Increases That The Plaintiffs Claim Should Have Occurred. The rapid development of Middle East crude oil production following World War II prompted a concern in the United States Government that relatively cheap imports of foreign oil might reduce domestic exploration and development activity. Accordingly, the Eisenhower administration created, on March 10, 1959, the MOIP program, which had as a goal the protection of national security by imposing mandatory limits upon the importation of foreign oil. (Presidential Proclamation No. 3279) The program had the further goal of

making certain that domestic oil companies did not take advantage of this protection against foreign oil by increasing their own prices. Successive national administrations used MOIP, from its inception until late 1973, to achieve and maintain this balance between national security and price stability. As Secretary of the Interior Udall, who was then the administrator of the program, said in 1965, "[i]n District V, the West Coast, the Secretary of the Interior has ample authority now to increase import levels at any time. This authority is adequate to prevent any significant price increases in the West Coast marketing region" (Memorandum from Stewart Udall to Joseph Califano, Assistant to President Johnson, Exhibit 51 of Atlantic Richfield submission concerning MOIP). The record submitted by the defendants is replete with similar statements made by responsible members of the Johnson and Nixon administrations asserting their authority and their willingness to use MOIP to stabilize domestic crude oil prices at existing levels. For example, Paul W. McCracken, Chairman of the Council of Economic Advisers under the Nixon administration (in an affidavit submitted by Atlantic Richfield at paragraph 12), assessed operations during his tenure as follows:

> "The central purpose of the MOIP was to maintain domestic crude oil prices at their existing level above the world market price in order to provide for sufficient exploration, development and production of domestic crude oil to avoid any undue dependence upon foreign oil supplies that might threaten the nation's national security. At the same time, the federal government did not intend to permit any increase in domestic crude oil prices, which would increase the MOIP's cost to consumers by enlarging the spread between domestic crude oil prices and world prices. . . . To achieve its objective of protecting the national security while avoiding price in-

creases that would increase the cost of import controls to consumers, the Administration sought in its administration of the import program to stabilize domestic crude oil prices at existing levels."

During the period of MOIP, as shown in a speech made on September 23, 1968, by a vice president of Union Oil Company, the defendants were aware that the Oil Imports Administration was in position to maintain a supply/demand balance "by filling the gap with foreign crude." The result was that ". . . District V could be long on crude oil but can never be short, because of the foreign imports. The end result, then, is that there is no demand incentive to raise domestic crude prices." (Exhibit 28, Joint Reply by Defendants Regarding MOIP.)

The independent oil producers were aware that the Government, through its control of oil importation, was effective in keeping down the prices of crude oil. (Deposition of Glenn Ferguson, former president of the Independent Oil and Gas Producers of California, pages 323-324.) In 1975, Kenneth Cory, the chairman of the California State Lands Commission, stated that under the oil import control program "there was essentially a negative pressure from import controls on domestic crude prices. . . ." (Statements before a Federal Energy Administration hearing on heavy California crude oil differential, August 5, 1975.)

Quota levels for oil imports were based upon estimates by the Bureau of Mines as to domestic oil production and demand. There are indications from governmental levels as high as that of President Johnson that demand was estimated somewhat liberally in order to make certain that crude oil prices remained stable.

The plaintiffs undertake to reduce the effect of the foregoing to a triable issue by submitting contradictory statements of four people. However, Secretary Udall specifically renounced or otherwise explained his com-

ments to which the plaintiffs refer and he described the circumstances under which they were made. Also, such comments are completely inconsistent with the many other official statements by the Secretary that this record contains. An example of Secretary Udall's assessment of MOIP is revealed in his deposition in which he testified that the Interior Department's authority to estimate the gap between demand and domestic production enabled the Government "effectively to control price increases." Deposition of Stewart Udall, page 52. He also asserted that with MOIP, "you didn't have a free market situation. It was a controlled market. And the government was sitting there doing the controlling." *Id.*, page 25.

Likewise, a remark made by Assistant Secretary of the Interior Cordell Moore was given a strained interpretation by the plaintiffs and was explained by Mr. Moore to harmonize with his many other assertions about how MOIP operated to keep crude oil prices stabilized. For example, in his deposition, he testified that the Interior Department had been trying, through MOIP, to fill the supply/demand gap and that such effort worked remarkably well "in stabilizing domestic crude oil prices in PAD V." (Deposition of J. Cordell Moore, pages 39-40.)

The other two individuals upon whose testimony the plaintiffs rely are John O'Leary, an Interior Department staff member, and T. M. Powell, vice president of Standard Oil Company in charge of supply. Both of these gentlemen testified to a lack of awareness that MOIP operated or was effective in the manner that the defendants ascribed to it. Each of these men held positions that might be expected to have had some involvement in such matters, although this is by no means certain. In any event, in the face of all of the evidence in confirmation of MOIP's affirmative function, I find it intolerable that the lack of recollection or of participation by two indi-

viduals should be the basis for requiring a trial on this issue.

The plaintiffs contend that the defendants' claims concerning the effectiveness of MOIP in keeping west coast crude oil prices stable totally ignore the gravity differential issue. However, the principal thrust of the plaintiffs' action is that the defendants did not pay Long Beach enough for its crude oil. Any adjustment in the gravity differential without increases in the average price of all crude would have been of no value to the plaintiffs. The function of MOIP was to keep overall crude prices from substantially increasing, irrespective of the gravity differentials.

Section 6(a) of the Proclamation establishing MOIP directed a Government agency to determine whether increases in crude oil prices were "necessary to accomplish . . . national security objectives . . . ." The Government used its authority under § 6(a) to impress upon the oil companies that any increases in crude oil prices might be met with increases in oil imports. McCracken Affidavit, paragraph 16. President Johnson's Chairman of the Council of Economic Advisers, Gardner Ackley, "demand[ed] that we [the Interior Department] control prices and use whatever tools that we had available to us, and do whatever jawboning we could do to keep petroleum prices steady." Deposition of Stewart Udall, page 50.

The plaintiffs assert that "[t]he defendants' reliance on government jawboning is seriously misplaced—price increases for crude oil continue to occur throughout the period in PADD's I-IV, the only section of the country in which the government attempted to use jawboning re MOIP." (Common Issues Brief, page 364.) The plaintiffs then list several miscellaneous price increases that they attribute to some of the defendants and others in mid-western United States in 1966 and 1967. The record

shows that the threat of allowing foreign imports of crude oil was less effective in PADs I-IV than in PAD V, due to the cost of transportation from the west coast. Thus, jawboning was about the only "tool" that the MOIP administrators had in areas other than the west coast. The effectiveness or lack of effectiveness of MOIP in PADs I-IV is hardly a measure of MOIP's ability to hold down prices in PAD V where the increase of foreign imports could make a substantial difference.

In any event, I find it difficult to accept the argument that the defendants should have ignored completely the Government's jawboning and that they should now be liable in treble damages to the extent that they did not defy the Government's attempt to hold down domestic crude oil prices.

In light of the foregoing, I find that any failure by the defendants to increase the prices that they paid Long Beach for its crude oil during the period of MOIP was due to the effectiveness of that program and not attributable to any conspiracy.

The foregoing is believed to provide a mandate for summary judgment for the defendants on the antitrust issues. However, in consideration of the possibility that higher authority might disagree, I shall devote the remainder of this memorandum to a discussion of my alternative reason for granting summary judgment: After more than eight years of discovery, the plaintiffs simply do not have the evidence to prove the antitrust conspiracy that they allege.

The Alleged Conspiracy. The plaintiffs charge the six present defendants (and former defendant Atlantic Richfield) with a conspiracy "to fix the prices they paid to plaintiffs and other producers for California crude oil at levels far below those that would have prevailed in a competitive market." (Page 5, Plaintiffs' Common Issues Brief.)

At the times concerned in this action, purchases of oil from the Wilmington Oil Field (and other oil fields in California) were made on the basis of "posted prices," which were published assertions by major purchasers as to the prices that they were willing to pay for the various grades of crude oil. The principal posters in the Wilmington Oil Field were defendants Arco, Mobil, Socal and Union.

Lighter crude oil is more conducive to being refined into gasoline than is heavier crude oil, which normally is converted into fuel oil or other relatively less expensive products. The posted prices regularly decreased at the rate of about five cents per degree of API gravity. Thus, for example, a poster offered to pay for 18° API gravity crude oil about five cents less per barrel than for 19° API gravity crude oil. The plaintiffs contend that this "gravity differential" was much too great and that the defendants knew it. Accordingly, say the plaintiffs, representatives of the defendants held five meetings during 1961 and 1962. These meetings resulted in a conspiratorial agreement under which the defendants would continue to purchase heavy crude oil from the plaintiffs at the artificially low posted prices that were based upon the artificially high gravity differential. They then would exchange such oil among themselves at its true value. According to the plaintiffs, such true value reflected a gravity differential of only about two cents per degree API, resulting in "underpayments" to the plaintiffs averaging 91 cents per barrel and totaling hundreds of millions of dollars.

The defendants acknowledge that the five meetings were held, but they contend that the purpose and accomplishments of such meetings were to revise and up-date a standardized method of defining the various grades of crude oil that the defendants necessarily exchanged among themselves through their respective pipeline systems. (These meetings and the "3-cut exchange" program that

resulted will be discussed later in this memorandum.) The defendants deny that they in any manner conspired at the meetings, or otherwise, with respect to prices that they would pay to Long Beach for its crude oil.

The plaintiffs have no direct evidence of such a conspiracy, but they have established that, during a period of about twenty years, including the times here concerned, the defendants posted, or otherwise offered to pay, substantially identical prices for the plaintiffs' crude oil. Such "[p]arallel business behaviour or 'conscious parallelism' is the type of circumstantial evidence which, absent more direct evidence, will be relied on in inferring unlawful agreement." *Weit v. Continental Illinois National Bank & Trust Co.*, 641 F.2d 457, 462 (7th Cir. 1981). However, as is noted above, the defendants vigorously deny any conspiracy and insist that the prices that they paid stemmed entirely from their individual and independent decisions. In the face of such denials, the plaintiffs "must come forward with some significant probative evidence which suggests that conscious parallelism is the result of an unlawful agreement [citing cases]. Parallel behaviour and the hope that something further can be developed at trial is not sufficient to warrant a trial on the merits." *Weit v. Continental Illinois National Bank & Trust Co.*, 641 F.2d at 462. The plaintiffs acknowledge this burden and contend that they will fulfill it by establishing several "plus factors" that will show that the conscious parallelism is the result of an unlawful agreement. We now discuss each of the "plus factors" and show how it is that they do not sustain the plaintiffs' position.

1. *The Alleged Underpricing and Distorted Gravity Differentials.* The plaintiffs contend that the uniform prices that the defendants paid for heavy crude oil were much too low, due to the five cent gravity differential, as opposed to a proper differential of about two cents. As is mentioned above, lighter crude oil normally is easier to

convert into gasoline than is heavier crude oil, from which are produced fuel oil and other less expensive products. These circumstances make the heavier oil of relatively less value to a refiner and account for the gravity differential for each degree of reduction in specific gravity.

In the course of the years here concerned, the various defendants, at one time or another, installed expensive refining equipment that has greatly increased the proportionate amounts of gasoline and other highly refined products that can be derived from the heavier crude oil. Thus, the values of the heavier crudes to the refiners that have this equipment has become substantially greater in relation to the lighter crudes and as compared to refiners that have not made such installations.

In support of their contention of underpricing, the plaintiffs present several "in house" memoranda by various employees of the defendants, which refer to the heavier crudes as being priced too low in relation to the lighter crudes, and suggesting that it would be in their respective companies' interests to exchange light crude oil at posted prices in return for heavy. However, most of these documents were prepared by personnel of companies that had installed the more efficient refining equipment and for whom the heavier crude therefore had a higher refining value than the posted price gravity differential would reflect. These documents, and other comments and testimony that talk of underpriced heavy crude oil, appear to be referring to the value of such oil to a particular refiner rather than its market value.

On the other hand, the defendants have submitted documents containing comments by others who expressed the view that a five cent gravity differential was by no means too large when the capital cost of the expensive sophisticated refining equipment is taken into account, or when considered from the standpoint of a marginal refiner who does not have such equipment.

In any event, it seems to me that subjective opinions of individuals as to whether the price of heavy crude oil was too low or too high are of little relevance here. Unless there was a shortage of heavy crude oil, the price would have been set by the marginal refiners, and there was no reason for any of the defendants to have paid higher prices just because the oil was more valuable to them than was the money that they were obliged to pay for it.

If there had been a shortage of heavy crude oil during the relevant period, it is to be expected that prices would have increased as the substantial refiners competed for the limited quantities of oil available, and the more marginal refiners would have fallen by the wayside. The failure of prices to increase in the face of such short supply would, indeed, be a plus factor suggesting collusion. The record shows that for a period of about a year beginning in July 1970 a shortage of crude oil occurred when production was cut back in Libya and a pipeline across Syria was closed, with a resulting decrease of tanker imports from the Middle East. In the fall of 1973 there also was a shortage due to the Arab embargo. Except for these two relatively brief periods, there was no substantial shortage of crude oil available to California refiners during the 1960s and 1970s. Throughout this period, according to the plaintiffs' experts, "small, relatively inefficient refiners continued to process heavy crude oils." *See Putnam Hayes & Bartlett, Inc.*, An Analysis Of Crude Oil Pricing In California, July 1982, page 20. Similarly, Mr. Kenneth Cory, the Comptroller of the State of California, asserted to the Economic Regulatory Administration, Department of Energy, in 1978 that California crude oil, "as a whole, is predominantly heavy. We have more domestic crude oil in the District than our refineries are currently equipped to handle." The plaintiffs, nonetheless, have presented documents upon which they rely to support their contention that there

was a shortage of oil during the relevant period. However, such documents were referring to *anticipated* inadequacies of *domestic* crude supply to a particular refinery. In some instances, the expected shortage did not materialize; in others, it was overcome by the importation of foreign crude oil.

Authoritative representatives of the defendants have testified in deposition or declaration that their respective companies had no difficulty in acquiring, at posted prices, all of the crude oil that their refineries could utilize. The massive record compiled in this case discloses no substantial indication to the contrary.

The plaintiffs have made a further forceful argument from which they infer that there must have been collusion among the defendants in keeping posted prices at low levels. Such argument is under the heading of *marginal refinery values.* The argument begins by stating some valid economic propositions: (a) A marginal refinery value normally reflects the dollar value of the products that could be obtained by adding an additional barrel of a particular crude oil for processing in the refinery, less the additional refining cost attributable to that barrel; (b) a refining margin is the difference between the refining value of the barrel of oil and the cost of acquiring such barrel; and (c) in a competitive market, a refiner, in order to maximize his profits, would keep on buying crude oil until the price of such oil would be substantially equal to its marginal refining value, i.e., the refining margin would be about zero.

The plaintiffs then point to studies made by their experts that show some 18,000 instances in which calculations made by defendants' personnel have revealed marginal refining values that were substantially greater than the costs of the corresponding crude oil purchased. The average refining margin was about 91 cents. The plaintiffs contend that this shows that if the defendants had

been acting competitively, they would have gone out and purchased more heavy crude oil until the prices of acquiring it equaled the marginal refining values. By doing so, they could have increased their profits, and their failure to do so is indicative of collusion in order to hold down the prices of heavy crude oil, of which they were substantial net buyers.

I have a lot of trouble with this rather simplistic proposition. It presumably would have considerable merit in a perfect economy. But, in the 1960s and 1970s there were many factors that a refiner would have had to take into consideration before responding to a marginal refinery value study by undertaking to acquire more oil for processing and by increasing the prices that he would pay in order to do so:

a. What was the purpose of the marginal refinery value study? Some of the 18,000 of such studies were directed only to assessing the desirability of entering into a transaction involving a relatively small quantity of oil and would have no relevance to a general increase in acquisition and refining.

b. If the study undertook to assess an overall marginal refining value, did it assume the refinery to have an open capacity? Refining values calculated with open capacity are greater than refining values calculated on the assumption of operations at full capacity.

c. If the refinery is operating at substantially full capacity (as generally appears to have been the situation), do present and foreseeable prospects warrant substantial expansion of the refinery? Refineries are not efficiently built in small increments.

d. What would be the cost of an expansion otherwise deemed appropriate, and how could it be capitalized and financed?

e. Will the product prices upon which the marginal refinery value study was based remain constant? How

substantial is the possibility that the product prices might decline as production increases?

f. Many of the defendants' contracts for the purchase of crude oil (including the Contractors' Agreement with the City of Long Beach) contain a "favored nation" provision, under which an increase in prices paid for crude oil to one seller would automatically trigger a similar and retroactive increase in the prices paid to others. Under such circumstances, an attempt to acquire a relatively small additional amount of crude oil at a higher price would substantially increase a marginal cost curve.

g. The record shows that the defendants were concerned about the reaction of the United States Government, in its Mandatory Oil Import Program (MOIP), in response to any increase in crude oil prices. If the defendants upped their posted prices, what would be the risk of a relaxation of the restrictions upon imports of crude oil, or even the abolition of the MOIP Program? In this respect, the interrelationships among MOIP, the Entitlements Program and the costs of domestic crude oil were matters for careful consideration in determining whether or not to buy more of such oil at increased prices.

It is evident from the foregoing (and probably from additional factors that have not occurred to me) that the significance of any marginal refinery value study, and the extent to which action should be taken on the strength of it, were matters for the careful business judgment of the refiner. (This assumes that price controls did not arbitrarily affect such judgment.) I do not see how any court, or any reasonable jury, could conclude from the 18,000 marginal refinery value studies that the defendants should have purchased more crude oil than they did. It is even more obvious that no inference of collusion may be drawn from their failure to have done so.

2. *Incentive To Conspire.* The second plus factor asserted by the plaintiffs is the defendants' alleged incen-

tive to conspire. The argument is made that the defendants were net purchasers of crude oil and that "[i]f heavy crude prices rose, . . . the defendants would be hurt. They had an incentive to ensure that competition did not break out in this marketplace because if competition broke out in this marketplace heavy crude prices would rise, and that would be against their economic incentives." Transcript, page 662. In 1961 and 1962 when the alleged conspiracy took place, it was not in the economic interests of *all* of the defendants to keep down the prices of crude oil, and for all of them to have joined in a conspiracy with such a goal would be quite surprising.

a. *Exxon* was strictly a producer and seller of crude oil in California until its refinery at Benicia was completed in 1969. It sold large quantities of oil at posted prices, and if such prices had been too low, Exxon would have lost several millions of dollars. By the time the Benicia refinery came on stream, Exxon anticipated that by 1972 it would be receiving about 300,000 barrels per day from its new discoveries in Prudhoe Bay in Alaska and between 50,000 and 100,000 barrels per day from the newly discovered Hondo field in the Santa Barbara Channel. With these discoveries, Exxon continued to be a net seller of crude oil in California and thus continued to be interested in higher prices. The plaintiffs never have advanced a satisfactory explanation as to how any conspiracy to keep crude oil low logically would have included Exxon.

b. The plaintiffs and their experts acknowledge that *Texaco* would not have been adversely affected by increases in crude oil prices in California during the relevant period. *See* Plaintiffs' Trial Brief, Section 3.3 and National Economic Research Associates Inc., Pricing Of California Crude Oil And Payments To The City Of Long Beach, March 1982, page 263. Certainly, Texaco would

not have been one of the defendants that "would be hurt . . . if competition broke out in this marketplace."

c. *Mobil, Socal, Shell, Union* and *Arco* were substantial producers of crude oil. However, they were, in varying extents, net purchasers. They acknowledge that they would have been willing to pay more for crude oil if they could have passed such increases into their product markets. But in the 1960s and early 1970s the petroleum product markets remained low, and it follows that those companies did have an incentive to keep crude prices as far down as practicable. However, as mentioned above, the record indicates that the respective defendants were able to obtain, at posted prices, all of the crude oil that they needed for their refineries. This fact tends to reduce the "plus factor" strength of any incentive to conspire to keep crude prices from rising, as does the absence of any apparent reason for Exxon and Texaco to have wanted to join such a conspiracy. In the absence of any common motivation, there are no grounds for inferring a conspiracy. *Zoslaw v. MCA Distributing Corp.*, 693 F.2d 870, 885 (9th Cir. 1982).

3. *Unbending Adherence To Identical Posted Prices.* Another plus factor, according to the plaintiffs, is the refusal of all defendants to deviate from the identical prices posted by Arco, Mobil, Socal and Union. The record shows that these companies did adhere consistently to the prices that they posted and refused to deviate from them or to pay bonuses over and above them. Texaco discontinued posting prices in California in 1962, and Exxon and Shell never did post prices in this state. All three of these defendants regularly made their purchases of crude oil in accordance with the prices posted by the others.

> "Parallel business behavior or 'conscious parallelism' is the type of circumstantial evidence which, absent more direct evidence, will be relied on in inferring unlawful agreement. *Theatre Enterprises v. Para-*

> *mount Film Distributing Corp.*, 346 U.S. 537, 540, 74 S.Ct. 257, 259, 98 L.Ed. 273 (1954). However, when defendants come forward with denials sufficient to shift the burden under Rule 56(e), plaintiffs must come forward with some significant probative evidence which suggests that conscious parallelism is the result of an unlawful agreement."

Weit v. Continental Illinois National Bank and Trust Company of Chicago, et al., 641 F.2d 457, 462 (7th Cir. 1981).

The plaintiffs insist that this uniformity in pricing is sinister because at the times of such refusals to pay more the defendants were desperately short of oil. If such had been the case, it is to be expected that a refiner in a competitive market would have bid or posted higher in order to get the oil that it needed. However, as noted before, except in 1970 and 1973 there were no sustained shortages of both foreign and domestic crude oil, and the defendants did not need to pay more in order to fulfill their requirements.

The posting companies contend that they maintained and adhered to their posted schedules in order to assure their many suppliers and prospective suppliers that all were being treated equally. Rather than increase or decrease their posted prices to accommodate transitory changes in their requirements, the respective defendants posted prices that generally reflected the lowest costs at which they believed that they could acquire all of the crude oil that they would need on a relatively long term basis. In making this determination, it was important to consider what other refiners were posting or paying. A refiner could not afford to pay more for crude oil than its competitors paid and remain competitive in the product market. On the other hand, a refiner could not afford to reduce its prices below those of its competitors, lest

its suppliers exercise their rights to cancel their contracts upon the lowering of posted prices.

The fact that posted prices were relied upon in determining royalty payments, depletion allowances and inventory costs further tended to discourage transitory changes in such postings. Also, as is discussed earlier in this memorandum, there was the concern as to what action the Government might take under its MOIP Program if crude oil prices were to increase substantially.

Despite all of the foregoing considerations, posted prices did not remain completely constant. Socal announced a five percent increase for all California crudes in February 1969. The next change was in November 1970, when Arco posted a nationwide increase of twenty-five cents. On May 4, 1973, Socal increased its California crude prices by another twenty-five cents, and a few days later Mobil added an additional one cent per degree for crudes under 18°. In each instance, the company instituting the price change was followed by the others in a matter of days. However, there is no indication that any of these mutual changes stemmed from prior agreement or understanding. On the contrary, all of the evidence submitted indicates that all of such changes were based upon the independent business judgments of the executives of the respective companies. It is normally to be expected that competition will cause companies dealing in fungible or standardized commodities, such as crude oil, to charge or pay parallel prices. *Weit v. Continental Illinois National Bank and Trust Company*, 641 F.2d 457, 463 (7th Cir. 1981); *Bendix Corporation v. Balax, Inc.*, 471 F.2d 149, 160 (7th Cir. 1972); *see also Krehl v. Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348, 1357 n. 22 (9th Cir. 1982); *Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1359 (9th Cir. 1976).

In light of all of the foregoing, and in the face of the detailed denials by the defendants, the plaintiffs have

not "come forward with some significant probative evidence which suggests that conscious parallelism is the result of an unlawful agreement." *See Weit*, 641 F.2d at 462.

4. *Communication Of Pricing Information.* At the hearing on the summary judgment motions, the plaintiffs' counsel argued that the documents relied upon by the plaintiffs require the inference that representatives of the defendants "were in constant communication with respect to price, with respect to prospective price moves, and with respect to actual price moves, and all of a sudden everybody is at the same price level." (Transcript page 664). Virtually all of the documents cited in support of this plus factor involve situations in which a defendant company had decided to change its posted prices on a certain date and had prepared and was mailing and otherwise publishing an announcement of such change. At about the same time, a representative of the company would make a "courtesy" telephone call to his counterparts in other defendant companies advising them of the impending change. Sometimes such calls would be made a day or so before the information became public, sometimes simultaneous. There is no indication that any of these telephone calls, as opposed to the public announcement, influenced any decision to change prices or otherwise had any anticompetitive purpose or effect.

Nonetheless, the plaintiffs contend that the supplying of such information is an inherent violation of Section 1 of the Sherman Act, under authority of *United States v. Container Corp. of America*, 393 U.S. 333 (1969). That case did involve exchanges of price information among the defendants, and the practices were declared illegal. However, the information supplied apparently "was not available from another source," and the Court inferred an agreement that reciprocal information would be supplied on request. 393 U.S. at 335. Justice Fortas, in concurring, expressed the understanding that the decision of

the Court did not hold that "the exchange of specific information among sellers as to prices charged to individual customers, pursuant to mutual arrangement, is a per se violation of the Sherman Act." 393 U.S. at 338. In any event, it clearly is the law that the exchange of information concerning any change or contemplated change in prices does not, in itself, constitute antitrust conduct. *See Sugar Institute v. United States*, 297 U.S. 553, 603 (1936); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 649 (1980); *Treasure Valley Potato Bargaining Association v. Ore-Ida Foods, Inc.*, 497 F.2d 203, 209 (9th Cir. 1974). Certainly, I can find nothing culpable in the defendants' giving each other information that is or is about to become public knowledge.

5. *Exchanges Of Proprietary Supply Information.* This asserted "plus factor" is closely similar to the one just discussed. The plaintiffs contend that the defendants were constantly revealing to each other proprietary information that normally is not made available to competitors, and that such practice is an indication of conspiracy. This argument is based largely upon the experiences of Messrs. Vogt and Tolle, whose employer, Exxon, sent them to California in 1965. The plaintiffs are disturbed by several aspects of the reports that the two men made in the course of their visits and upon their return to Houston. Vogt and Tolle stated that they were cordially received by representatives of the defendant companies and that they obtained from them a considerable amount of information. However, I can find nothing culpable in the cordiality or in the information that was acquired.

The principal reason for Vogt and Tolle to come to California was to find a market for the large quantity of crude oil that Exxon shortly would be receiving as a co-producer from the East Wilmington Field. They thus had a legitimate interest in learning all that they could about the manner in which crude oil was bought and sold in this area; and, as potential purchasers of Exxon's

new supplies of oil, the defendants had valid reasons to be cordial and cooperative. The information that was exchanged, as alleged by the plaintiffs, concerning forecasts of supply and demand, prices, and gravity differentials, comes within the area of this mutual legitimate interest.

A second purpose of the Vogt-Tolle trip was to explore available sources of supply of domestic crude oil for a new refinery that Exxon was planning to build in Northern California. Here again, as prospective suppliers of such oil, the defendants had good reason to act cordially and cooperatively with representatives of a major prospective customer. Forecasts of the anticipated availability of various grades of crudes, their pricing trends, and the effect upon such prices of current and future refinery modifications, were matters of legitimate mutual concern that were freely discussed.

It was obvious that most of Exxon's anticipated sales or exchanges of oil would have to involve use of the other defendants' pipelines. Inasmuch as the three-cut exchange program frequently was utilized in pipeline transactions, Union gave Vogt and Tolle orientation concerning such program. In this connection, the plaintiffs seek to give support to their contention of conspiracy by referring to a document prepared by an Exxon employee which states, in part, that "[a]s you are probably aware, industry in California works together very closely and a great deal of exchanges are constantly being made involving a number of companies." This comment clearly pertains to the practice of the industry in utilizing the individually owned pipelines in exchanging various grades of crude oil in order to meet the needs of the respective companies. Such a practice does necessitate working together very closely and, as the memorandum stated in the sentence immediately following the quoted reference, "[t]he construction of a coastal refinery will

provide us with the flexibility to make various types of crude and products exchanges."

The plaintiffs point with suspicion to the fact that the Exxon representatives discussed the location of the new refinery with defendant personnel and that the latter recommended that it be placed in Southern California. Future sales of crude to Exxon for its refinery and the availability of pipelines for transportation could hardly be discussed without considering where such refinery was to be located.

The plaintiffs assume that the foregoing tends to help them establish that there was a conspiracy to hold down the prices that the defendants would pay for the plaintiffs' heavy crude oil; that the goals of such conspiracy were accomplished through use of the three-cut exchanges; that Exxon knew of and participated in such three-cut exchanges; and that Exxon therefore must have known of the conspiracy and joined it. I have indicated my belief that the exchanges of information discussed in this section of this memorandum do not constitute a plus factor that points toward a conspiracy. In addition, both Vogt and Tolle have been deposed at length and have testified that throughout their many dealings with representatives of other defendant companies, there never was any suggestion of or reference to a conspiracy of any kind, nor did they infer the existence of any such conspiracy. In the face of such testimony, and in light of the valid reasons for the exchanges of information herein discussed, the speculations of the plaintiffs are devoid of significance as a plus factor. *See Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 928 (9th Cir. 1980).

6. *Manipulation Of Alaskan Crude Prices.* The plaintiffs charge that the defendants combined to maintain an unrealistic and unsupportable gravity price differential of five cents per degree in the prices that they posted for

Alaskan crude oil, in order not to give cause to question the same differential that was conspiratorially set in California. The plaintiffs rely upon many documents that were prepared by employees of the defendant companies for internal consideration. These memoranda express views as to whether or not the respective employers should post crude prices, and, if so, what the prices and the gravity differentials should be. In some instances a writer would make the suggestion that a reduction of the gravity price differential in Alaska might provide arguments for those seeking to bring the prices of heavy California crude up closer to the lighter crudes.

The memoranda also contained much speculation as to what other companies likely would do, and there were several expressions of uncertainty as to what courses the writers' companies should follow. Comments of this nature tend to belie, rather than to support, the concept of an agreement among the defendants governing the prices or the differentials that would be offered.

The memoranda disclosed the realization that the interests of the defendant companies were quite divergent. For example, since 1961, Socal had been posting prices higher than those offered by the others and which included a gravity differential of five cents per degree. It was "felt" that Arco "might adopt" a three or four cent differential. Mobil wanted to retain a spread of five cents per degree because the gas-oil that it gave up in exchanges was lighter than the oil that it received in return.

However, none of the documents contained any suggestion that the prices posted or to be posted in Alaska were determined by agreement among the various defendants, nor was there any indication of a mutual decision that Alaska prices should be fixed to be in harmony with the gravity price differentials in California or in the Wilmington Oil Field.

7. *The 1961-1962 Three-Cut Exchange Meetings.* The next "plus factor" relied upon by the plaintiffs is the fact that the 1961-1962 meetings to revise the three-cut definitions were held. The plaintiffs argue that representatives of the defendants sat down for an entire year trying to find a mechanism to avoid using the very posted prices that they had set, and that the only rational inference that can be drawn from such conduct is that the parties arrived at an understanding that they would maintain those distorted posted prices. (Transcript, pages 666-667).

On October 17, 1984, this court filed a Memorandum of Decision and separate Findings of Fact concerning cross-motions for summary judgment with respect to the accused three-cut exchange practices. There is no need to repeat here the descriptions and analyses of the three-cut process that are therein contained. The three-cut exchange practice had been going on since long before 1960, and such a practice is not inherently anticompetitive. By 1961, the measures of crude oil that the defendants were using in the three-cut exchanges had become outdated. This was largely because some of the defendants had installed sophisticated refinery equipment that caused heavier crudes to have increased values in relation to lighter crudes, which the current measures did not adequately take into account. The parties to the meetings were seeking to work out formulae that would better insure that the parties to an exchange would receive or get credit for oil having a refining value substantially equivalent to the oil that they delivered. Operations under the revised system resulted in the exchanges among the defendants being kept in relatively close balance, both as to amounts of crude oil delivered and received and the respective gravities of such oil.

Upon considering all of the evidence submitted, it is clear that the focus of the meetings was directed toward how to accomplish exchanges of oil *owned by the parties*,

irrespective of whether such oil had been purchased from the plaintiffs or from another producer, imported from abroad, or lifted from a party's own wells. There is no indication from the documents or from the depositions or declarations of the participants at the meetings that there was any discussion with respect to posted prices.

In an earlier decision denying the defendants' motions for summary judgment with respect to three-cut exchanges, I said:

> "In one manner or another, the trader that gives up the heavier oil is going to be better off financially under a [revised] three-cut exchange than he would have been had the transaction been based upon posted prices. To the extent that such a result stems from an agreement express or otherwise, designed to avoid increasing posted prices, it seems to me that it would constitute price fixing in violation of the antitrust laws."

Memorandum of Decision of October 17, 1984, page 12. As has been discussed above, the hearings on the present motions have disclosed that, apart from the speculations of the plaintiffs, there is no evidence of "an agreement, express or otherwise, designed to avoid increasing posted prices. . . ."

8. *Exxon's "Rigid Adherence To These Distorted Prices".* Exxon was not represented at the 1961-1962 meetings. However, its conduct following the Vogt and Tolle visits in 1965 is alleged to constitute a further plus factor disclosing a conspiracy and Exxon's part in it. According to the plaintiffs' dramatic summary, Exxon "comes out here. They are told about the distorted prices; they are told 'this is how we avoid them.' They are told the mechanism of the 3-cut. They are told about the values of the 3-cut and then Exxon jumps in with both feet and enters into the 3-cut exchange as soon as its refinery is on stream, and enjoys the benefits of the price-

avoidance aspect of the 3-cut exchange, and when in fact this law suit was filed and things started falling apart, Exxon is in there proposing equally devious kinds of methods to avoid the posted price." In addition, according to the plaintiffs, there is "Exxon's inexplicable rigid adherence to these distorted prices . . ." despite a "serious, desperate, critical shortage . . . of heavy crude oil." (Transcript, page 1100).

As is indicated in the discussion of plus factor No. 5, "Exchanges Of Proprietary Supply Information," Messrs. Vogt and Tolle came to California in 1965 and were cordially received by the defendants. The reports that they made back to Houston formed the bases for several of the plaintiffs' contentions. However, there is no indication that they received any information about prices of crude oil being "distorted". They did make the observation that ". . . to a modern refiner, the value differential is considerably less than the posted price differential." (Plaintiffs' Common Issues Brief, Exhibit 202). They were told of the use of the three-cut procedure; they also learned that many crude trades are made under the three-cut program rather than at posted prices, because ". . . efficient refiners see considerably less value for increasing gravity than the 6c/° API gravity price would indicate." *Id.* The Exxon representatives considered this information important because they anticipated that following the construction of a coastal refinery and the use of other companies' pipelines, Exxon would be participating in three-cut exchanges.

Here again, the record discloses no suggestion that the three-cut system was the result of a conspiracy to hold down posted prices. In the absence of such a conspiracy, I am unable to find anything culpable in a three-cut program. A refiner is not obliged to pay more than market prices for crude oil even though its value to him is greater because of the efficiency of his operation. By the same token, the market need not govern the value that he

will place upon such oil in an exchange or a sale to another.

Perhaps it could be said that Exxon did "jump[s] in with both feet and enter[s] into the 3-cut exchange" as soon as its Benicia refinery came on stream in 1969. Some of these transactions occurred because the owners of the pipelines that Exxon wanted to utilize required a three-cut exchange. In other instances, it was to Exxon's financial advantage to make use of the lesser gravity differential of the three-cut exchange program.

The plaintiffs refer to two "devious kinds of methods to avoid the posted prices." One apparently was a proposal that a synthetic Badger test be used to make a comparative valuation of various types of crudes and eliminate the expensive distillation process. The other reference was to an internal Socal memorandum that vaguely reported a suggestion made by a Mr. Clarke of Exxon after this suit was filed to the effect that some kind of a "value" exchange might be substituted for the three-cut system. These items are of doubtful materiality and are not sufficiently developed to warrant the "devious" designation.

With respect to the "serious, desperate, critical shortage . . . of heavy crude oil," it is obvious that in 1969 Exxon was anticipating or experiencing an inadequate supply of domestic heavy crude for its newly operating Benicia refinery. The plaintiffs point to contemporaneous documents that refer to such shortage with varying degrees of alarm. But these documents also discuss means of alleviating the problem, such as importation of Canadian oil (Section VIII, Tab 28 of the plaintiffs' documents in support of their oral presentation regarding the summary judgment motions); receipt of a cargo of Swedish crude and deliveries from Arco that would take care of the problem through July (Tab 30); sell off light crude "if it can be replaced with heavy crude" (Tab 31); take options on available crudes (Tab 32); "import heavy

foreign crude" (Tab 34). The plaintiffs content themselves with pointing to the expressions of apprehension, and they make no comment as to whether or not any of the proposed remedies were applied, thereby easing the shortage.

One of the memoranda upon which the plaintiffs rely is dated July 1, 1970, and asserts "[n]ext year we are going to be in desperate need for heavy California crude" (Tab 34). This perceived problem became compounded by the shortage of imports from the Middle East during the latter half of 1970 and the early part of 1971. According to Exxon, the problem was resolved by the importation in 1971 of 1,700,000 barrels of heavy Bachaquero crude from Venezuela for the Benicia refinery. Exxon submitted in these proceedings an affidavit by W. J. Walstead. He stated that the delivered cost of this Venezuelan crude was lower than the delivered cost of comparable heavy California crudes and that as a result of such imports "I am not aware of any extended period of time when I was Refining Crude Coordinator [1969 to 1973] that the Benicia refinery sustained shortages of crude, either heavy or light." (Walstead Affidavit, paragraph 8). There is nothing in the record to the contrary.

Under these circumstances, the unwillingness of Exxon to overcome its "shortages" by bidding up the prices of California crude is hardly "inexplicable," much less an indication of conspiracy.

9. *Admission Of Shell Into THUMS.* The next plus factor urged by the plaintiffs is the action taken by the other defendants to persuade Shell not to begin posting prices in the East Wilmington field. The script goes like this:

(a) Despite its earlier participation in the conspiracy to keep heavy crude prices low, in 1964 Shell was contemplating that it might start posting prices in order to acquire a larger share of heavy crude.

(b) Texaco, Exxon, Union and Mobil (who made up the THUM consortium that would bid to produce and receive 80% of the oil from the East Wilmington field) were aware of such contemplation and feared that if Shell were to start posting it might become a "loose cannon" and cause a "breakout of competition in the marketplace." (Transcript, pages 1122 and 1123).

(c) Each of the THUM companies was anxious to get as large a share in the forthcoming oil production venture as it could and was reluctant to reduce its 25% by admitting another partner. Union and Exxon were definitely willing to go to a one-third share. (Transcript, page 1125).

(d) The THUM companies believed that the admission of Shell to their group would keep Shell from posting, and so they combined to accept Shell in return for its promise not to post.

The documentary record gives quite a different story:

(a) In 1964 two internal memoranda were written by Shell employees which recommended that Shell start posting because a continuation of the large gravity price differential would put Shell at a comparative disadvantage. (This is scarcely in harmony with the concept of Shell's being a participant in an alleged conspiracy to keep the differential high.)

(b) In the spring of 1964, two Socal documents (Tabs 6 and 7 of Section IX of the plaintiffs' submission at oral argument of the summary judgment motions) reported that Shell had "indicated" that it was thinking of posting in California in order to acquire additional supplies of heavy crude. Of course, Socal was not one of the THUM companies, and we do not know to what extent, if at all, Shell's "thinking" was made known to them.

(c) In the course of the meetings resulting in the formation of THUM, the participants were not desirous of being members of a five-party group, and they discussed what they would do if one of the current four were to drop out. According to the December 7, 1981 deposition of Leonard C. Stevens, the Mobil representative:

> "A In the meetings, the joint meetings, we all discussed the possibility if anybody dropped off would the other parties step up to a third, and I think all of us—Humble [Exxon] definitely said they would. We [Mobil] were probably a little more reserved on that point.
>
> Q Did Texaco say anything along that point?
>
> A They were reserved, too.
>
> Q Union?
>
> A I think they were more bullish than we were." (Page 41).

It appears that this is the basis of the plaintiffs' conclusion that Exxon and Union were definitely willing to go to one-third interests. According to Mr. Stevens, although Mobil authorized him to take up to a one-third share, if necessary, "[t]hey also put a rider on it, if we could get the other people to step up, that would be okay with them." (Deposition, page 53).

(d) Shell was desirous of participating in the anticipated East Wilmington field production. It would have preferred to bid alone but could not absorb the entire Field Contractor's 80% share of the total production. Shell's offer to join the Socal-Arco-Signal combination that was planning to bid was rejected, and it therefore applied to the THUM group.

(e) Shell's final application for admission to THUM on an equal basis with the other four, or 20%, was made orally by a Mr. Jerry Burton to Mr. Stevens. Accord-

ing to the latter, he told Mr. Burton that he, Stevens, would have to check with the other companies and with his own management. He did so, and they all said to let Shell in. According to Mr. Stevens, Mobil considered the inclusion of Shell to be attractive because it reduced the risk of Mobil receiving more oil than it wanted, and it also reduced the size of each company's required capital investment. (Stevens deposition, page 115).

(f) Mr. Stevens testified that the matter of Shell posting or not posting never was discussed at any of the meetings of the THUM group, nor did he have any such discussion with anyone at Shell. (Stevens deposition, page 134, 154-55).

From the foregoing, it is evident that the record contains no factual basis to justify the conclusion that the THUM participants conspired among themselves and with Shell to admit the latter to THUMS in return for Shell's agreement not to post prices. The plaintiffs' ninth plus factor can only be described as speculation bordering on fantasy.

10. *The Economists' Opinions.* The plaintiffs cite as their tenth plus factor the opinions of their experts that the crude oil market was noncompetitive and it therefore must have been controlled by conspiracy. Such opinions are based upon an economic principle stated as follows:

> "In a competitive industry each refiner will maximize profits by consuming each crude oil input up to the point that its marginal value equals the market price. If a refiner has a higher valuation for a crude than the market price, it will expand its use until the value of the last (marginal) barrel used is equal to its price."

Affidavit of Dr. Thomas R. Saving dated May 17, 1984, page 2.

Factual studies by the economists have caused them to assert that the marginal values that the defendants ascribed to their heavy crude oil exceeded the posted prices, but the respective defendants did not bid up the prices that they offered to pay for heavy crude oil in order to increase their supplies. The conclusion follows that the market was collusively maintained.

As is acknowledged earlier in this memorandum (page 15), the economic principle quoted above appears to have theoretical validity, and the defendants have not challenged it. But in order for this principle to be applied to the present case, several factual assumptions must be made, among which are:

(a) That the defendants, acting independently, would have been unable to acquire, at posted prices, the quanties of crude oil, domestic or foreign, that they believed appropriate for processing through their refineries.

(b) That the marginal values upon which the experts relied provided, without more, a sufficient foundation upon which to base a program of increased purchases at higher prices and despite all of the expensive consequences that would accompany such actions.

(c) That the respective defendants were aware of the validity of the foregoing assumptions and thus their failure to seek more crude oil at higher prices stemmed from conspiratorial collusion rather than from honest (even if benighted) management decision.

This court should not, and would not, knowingly, disregard the unchallenged opinion of an expert in his own field. But it is the function of the court, rather than the expert, to determine whether or not there is enough evidence in the record to create a factual issue in support of the hypotheses upon which the expert opinion is based. Having examined and pondered over the record as best I have been able, I have concluded that such evidentiary

support is lacking, as is indicated throughout this memorandum.

11. *Crude Oil Surveys.* The record shows that the defendants frequently exchanged information concerning their respective supplies of various types of crude oil, as well as their needs for such oil, and the plaintiffs point to this practice as constituting an illegal conspiracy. However, testimony by responsible representatives of the defendants has emphasized that there were valid, legitimate reasons for such exchanges of information and for the formal surveys periodically conducted by Mobil and Socal. None of the defendant companies had direct control over, or access to, all of the crude oil of the proper mix that they needed in their refineries. Accordingly, as a matter of competitive self-interest, they were constantly alert to keep track of trading opportunities. The tasks of their "trader" employees were to ascertain what crudes other refiners had in surplus and what crudes they might want to obtain in exchange, either immediately or in the foreseeable future.

The case of *United States v. United States Gypsum Co.*, 438 U.S. 422, 441, n. 16 (1978) contains a comment that is particularly significant here:

> "The exchange of price data and other information among competitors does not invariably have anticompetitive effects; indeed such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive . . . A number of factors including most prominently the structure of the industry involved and the nature of the information exchanged are generally considered in divining the procompetitive or anticompetitive effects of this type of interseller communication."

In the absence of direct evidence to the contrary, it is beyond factual dispute that the surveys and other ex-

changes of information here concerned had legitimate business purposes. Apart from the speculation of the plaintiffs, there is no indication that such exchanges had any effect upon the current prices paid to the plaintiffs or had any other sinister purpose or result.

Conclusion. Throughout my consideration of these motions for summary judgment, I have had thoroughly in mind the injunction of the Supreme Court as set forth in *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473 (1962):

> "We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'"

However, to use "sparingly" does not mean never. In a later antitrust case, the Supreme Court affirmed an award of summary judgment to the defendant. The opinion of the Court, written by Justice Marshall, stated:

> "While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint."

First National Bank v. Cities Service Co., 391 U.S. 253, 290 (1968). The latter comments are applicable here. This case has been pending for ten years. During this period, literally hundreds of depositions have been taken,

and many thousands of documents examined in discovery proceedings that must have been exhausting. Certainly, the plaintiffs have had ample opportunity to obtain all of the evidence that they could expect to present at a trial.

During the years that this case has been before me and, more particularly, in undertaking to adjudicate these summary judgment motions, I have devoted a great deal of time in trying to achieve a full understanding of the contentions of the parties as set out in their briefs and their oral arguments and documented by their exhibits. Although I cannot assert with confidence that I have a complete grasp of all of the evidence contained in the very large record that has been amassed, my understanding must necessarily exceed that which could be expected of the members of a jury.

As is indicated early in this memorandum (page 10) the plaintiffs do not have any testimony or documents that give direct support to their theory of conspiracy. They therefore have been obliged to seek circumstantial proof. With great effort and remarkable imagination, they have presented the plus factors that have been discussed in this memorandum. In the preceding discussion, an attempt has been made to show why the evidence presented in support of these plus factors does not warrant an inference of conspiracy. The discussion has been far from exhaustive, in light of the complicated nature of some of the contentions and the many disparities among some of the positions and conduct of the various defendants. If we start out with conspiracy as an established fact, some of the conduct of some of the defendants regarding some of the plus factors can be harmonized with that assumption. However, such conduct is equally in accord with the legitimate pursuit of independent interests. And in many instances, the actions of the defendants and the contemporaneous comments of their representatives are

completely inconsistent with the existence of a conspiracy to maintain low prices for crude oil.

> "The verdict of a jury cannot rest on guess or speculation. . . . The jury is not permitted to speculate in choosing one of alternative possibilities, but is restricted to reasonable inferences based upon facts. . . .' (T)he province of fact finding and inference drawing must be exercised in the realm of probability, not speculation, surmise and conjecture.'"

Wolf v. Reynolds Electrical & Engineering Co., 304 F.2d 646, 649-50 (9th Cir. 1962) (citations omitted).

Being mindful of this rule, I have pondered whether the record here developed contains enough facts upon which a reasonable jury could draw an inference of liability that would be "exercised in the realm of probability, not speculation, surmise and conjecture." I am confident that it could not. Accordingly, summary judgment is granted to the respective defendants on the antitrust issues.

Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, there is no just reason for delay in the entry of final judgment on the plaintiffs' antitrust claims, and final judgment for the defendants on these claims shall be entered immediately.

DATED: September 19, 1985.

/s/ William P. Gray
WILLIAM P. GRAY
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MDL Docket No. 150 WPG

LONG BEACH

CV 75-2232 WPG

IN RE COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRODUCTS ANTITRUST LITIGATION

MEMORANDUM OF DECISION ON DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT BASED UPON THE ENTITLEMENTS PROGRAM

[Filed Dec. 13, 1984]

The defendants have moved for partial summary judgment based upon the Entitlements Program, which was imposed by the Government on November 1, 1974, and continued in effect until after the end of the damage period at the close of 1977. The matter has been briefed and argued thoroughly and submitted to the court for decision. Partial summary judgment will be granted for the defendants as prayed.

A simplified description of the Entitlements Program is that in order for a refiner to process and sell a barrel of domestic oil that was under price control, he was obliged to buy an entitlement. The proceeds of such purchase were used to compensate a refiner of the more expensive uncontrolled oil or foreign oil.

The defendants contend that the cost of such entitlement, when added to the prices at which a refiner was able to purchase controlled lower tier oil from the Wilmington Oil Field, raised the total cost of such oil to the extent that it exceeded the cost of comparable and available uncontrolled oil or foreign oil. If this contention is established, the plaintiffs would not be entitled to damages for the period covered by the Entitlements Program, because the defendants could not have been expected to pay any more for controlled oil than they did pay, much less the "but for" prices that the plaintiffs contend that they should have paid. The question is whether the Entitlements Program did raise the cost of controlled oil to the extent that refiners would not pay more for it than they did pay because of the availability of uncontrolled and foreign oil.

The defendants have submitted compilations of cost data to establish that the posted prices for controlled oil plus the cost of entitlements exceeded the cost of comparable uncontrolled oil and foreign oil. For example, a chart compiled by Laura E. Forbes shows that the prices posted by Standard Oil Company of California on the first day of each month from February 1, 1975, through 1977, for 18 degrees API controlled oil from the Wilmington Oil Field exceeded the cost of uncontrolled oil by a range of from 16 cents to $2.31 per barrel, for an average of $1.28 per barrel.[1]

The defendants also present a schedule (Appendix G to their reply memorandum dated June 3, 1983) that shows 17 degrees Venezuelan oil to be less expensive than the posted prices of Wilmington 18 degrees crude oil, plus entitlement costs, throughout 1976 and 1977, except for the first two months of 1977. It is true that, in all

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[1] The first item shown on the chart was January 1, 1975. In extreme contrast to all of the later months, it inexplicably listed a 7 cent higher cost of uncontrolled oil.

but two months of 1975, the chart shows the prices of the Venezuelan crude oil to have exceeded the Wilmington crude oil ceiling prices, which the defendants paid, by amounts ranging from 9 to 63 cents. However, these amounts are far less than the 93 cents by which the plaintiffs' "but for" prices exceeded the actual ceiling prices.

The U.S. Government Awareness. There can be no doubt that the federal officials responsible for establishing and administering the federal energy regulations were thoroughly convinced that the Entitlements Program made California's low grade controlled oil uncompetitive with uncontrolled oil and imported oil. This awareness began as early as the fall of 1975, and over the next three years such officials pondered the problem and held hearings in attempt to determine what to do about it. For example, on October 7, 1975, an "in house" memorandum to the Director of "Regulations Management" of the Federal Energy Administration stated:

> "The differential between controlled and uncontrolled oil prices in California, and probably throughout the nation, is less than the price of an entitlement. This has already resulted in California refiners refusing to purchase old oil, while offering to purchase all available new oil." (Exhibit 173 to the defendants' memorandum in support of their motion).

Such awareness is further illustrated by a memorandum dated March 1, 1977, by the FEA Deputy Associate Administrator, which stated:

> "Because the [Entitlements] Program equalizes against average prices, the entitlement obligation for domestic crude makes some controlled crudes uncompetitive with substitutable imported crude when they are sold at ceiling prices. This effect is particularly pronounced with regard to lower tier ceiling prices with California . . . ." (Defendants' Ex-

hibit 212.) *See also* defendants' Exhibits 214 and 243.

The Independent Producers' Awareness. California's independent oil producers were fully aware of the effect of the Entitlements Program in holding down the prices that California refiners were willing to pay for heavy controlled oil. On October 13, 1976, the Vice President of the California Independent Oil Producers' Agency testified at an FEA hearing on Heavy Crude Oil Gravity Price Differentials:

> "This [Entitlements] program has so distor[t]ed the historic differentials between crude oils that today a refiner has no incentive to purchase low gravity oil if higher gravity oils are available—and they are—from foreign sources.
>
> * * * *
>
> "For this reason it is proposed that the Entitlements Program be modified so that refiners will be encouraged to purchase domestic heavy oil instead of foreign . . . ." (Defendants' Exhibit 196, pages 103-105.) *See also* defendants' Exhibit 194.

On March 25, 1976, the Executive Vice President of the California Independent Producers Association wrote to Frank Zarb, the FEA Administrator:

> "Attached are copies of several cancellation notices received by members of CIPRO. These refineries in our area are cancelling contracts because it is more economical to purchase foreign crude oil than domestic crude oil. "In response to my question on entitlements at the March 12th meeting, you said, 'My staff and I are aware of the problem and we will change the entitlements program to favor domestic oil within *two weeks*'. I hope this information will assist you in meeting your objective." (Defendants' Exhibit 178.)

That objective apparently was not immediately met, because on September 8, 1976, the Vice President of the California Independent Producers Agency testified at an FEA hearing that, because of the Entitlements Program refiners were cancelling domestic crude purchase contracts with members of the Association ". . . in order to buy foreign oil." (Defendants' Exhibit 191, page 24).

The State of California Awareness. Responsible California officials shared the same awareness as did the FEA and California independent producers. On October 24, 1977, Kenneth Cory, Chairman of the California State Lands Commission, wrote:

> ". . . the total net cost to a refiner of California lower tier oil—including price, net entitlement burden and transportation—is higher than the net cost of the same oil as upper tier oil . . . . Consequently, even without allowing for the lighter gravity of the West Coast imports, California lower tier oil at ceiling effectively costs a refiner more than the import because of entitlements." (Defendants' Exhibit 236, pages 2-3).

On June 6, 1977, William F. Northrop, Executive Officer of the California State Lands Commission, in writing to the FEA, said that ". . . The inability of California producers to obtain ceiling prices for lower tier production is the result of the Entitlements Program." (Defendants' Exhibit 223, page 1).

The same theme was echoed by Governor Edmund G. Brown, Jr. on August 21, 1978, when he testified to a Congressional committee:

> "No. 1, we have oil in California that is of a quality that it cannot compete under Federal Regulations with the foreign oil. . . . That is the Entitlement Program."

The Long Beach Awareness. Responsible Long Beach officials were thoroughly aware of the effect of the Entitlements Program upon California heavy crude oil prices. Leonard W. Brock was the Director of the Long Beach Department of Oil Properties. On January 19, 1976, he gave a statement to a committee of the United States Senate in which he said that "The cost of Entitlements for those refiners who are forced to buy them has created a situation wherein imported light Arabian crude oil, at $12.65 per barrel, is cheaper than a barrel of lower tier Wilmington crude oil." (Defendants's Exhibit 184, pages 7-8).

On March 3, 1977, Mr. Brock stated to the FEA that "The Entitlements Program has certainly frustrated the price situation with lower tier crude oil produced in California." (Defendants' Exhibit 213, page 12). He expressed the same attitude a year later in testifying at a Department of Energy hearing: "I can assure you it is 100 per cent entitlements that we are not getting ceiling price for our lower-tier oil." (Defendants' Exhibit 249, page 305).

In October 1976, the FEA increased ceiling prices for lower tier crude oil. However, such increases did not have a corresponding effect upon posted prices. On August 4, 1977, at an FEA hearing, Mr. Brock tells why the increased ceiling prices were not paid by refiners:

> "Nearly a year ago Congress directed the FEA to correct a California heavy crude gravity differential problem. Since that time the FEA held hearings and attempted to correct the problem by increasing the ceiling price for California lower tier crudes. However, the entitlements program worked so as to defeat that effort. Hearings were held on the entitlements program but as yet nothing has been done. * * * It hardly seems realistic to impose ceiling

> prices that cannot be paid because of restrictions in parts of your own regulations. * * *"

On August 25, 1976, a memorandum by the principal petroleum engineer in the Long Beach Department of Oil Properties states:

> "It is evident from the manner in which entitlements are currently handled that the future of lower tier oil is dismal and requires some overall adjustment in the handling of entitlements to make lower tier oil competitive with foreign oil." (Defendants' Exhibit 186, page 3).

The record submitted by the defendants contains many more exhibits that, along with those referred to above, indicate quite clearly that the Entitlements Program was the principal reason why the market value of domestic controlled oil did not exceed the posted prices.

Of course, substantially all of the assertions contained in the exhibits are expressions of opinion and also constitute hearsay. However, virtually all of the declarants qualify as experts in the field of crude oil pricing, and their opinions may be considered competent. With respect to hearsay, the statements of the federal, state and city officials are believed admissible under Rule 803(8)(B), as constituting ". . . reports [or] statements . . . of public offices or agencies, setting forth . . . (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report . . . ." In addition, I believe that the statements of the public officials or agencies, as well as those of the officers of the petroleum producers associations, qualify under the general exception to the hearsay rule contained in § 803(24).[2]

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[2] "A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than

The unanimity of the relevant expressions by currently knowledgeable people gives further justification for the conclusion that "the general purposes of these rules [the Rules of Evidence] and the interests of justice will best be served by admission of the statement into evidence." Rule 803(24)(C).

The plaintiffs vigorously undertake to challenge the conclusion that the Entitlements Program held down the prices of heavy controlled crude by creating a propensity by refiners to purchase uncontrolled oil and foreign oil. They begin by seeking to renounce the above-discussed assertions by California and Long Beach officials on the ground that in making such statements those officials were only repeating what the defendants had told them. Such an explanation is hardly complimentary with respect to the perceptiveness or the competence of the officials concerned, nor does it appear to be in harmony with the words used or the contexts in which they were asserted. However, even assuming that the statements of the State and Long Beach officials have now become suspect or should be disregarded, the plaintiffs have not shown that such statements and those of the federal officials and the independent producers were wrong.

In attempting to demolish the effect of the Entitlements Program upon domestic controlled crude prices, the plaintiffs first assert that "Domestic Stripper And Exempt Crude Oil Prices Were Not Competitive And Were Below Alternative Crude Price Levels." (Plaintiffs'

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any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by the admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant." Rule 803(24)(C) Rules of Evidence.

supplemental memorandum, page 6). They support the contention of non-competitiveness by citing assertions in the defendants' records to the effect that exempt crude prices on the west coast of the United States were significantly less than those east of the Rockies and in relation to landed Arabian light crude.

I have much trouble with this contention. In the first place, the problems of transportation across the Rockies would tend to explain how locally produced exempt oil would cost less here than in mid-western United States. Similarly, the plaintiffs give no reasons why, under competitive conditions, exempt oil should be expected to cost more than landed Arabian light crude. And, thirdly, the plaintiffs' argument that the prices of domestic exempt crude oil and foreign oil were below alternative crude price levels is the very point upon which the defendants rely: domestic exempt oil and foreign oil were priced less than controlled oil plus the entitlements burden. Thus, I do not see how the foregoing discussion is either indicative of a conspiracy or an obstacle to the defendants' summary judgment motion.

The plaintiffs next seek to show that at least some of the defendants concluded at one time or another that the heavy controlled oil from the Wilmington Oil Field, even after payment of the entitlement charges, had a greater refining value than did Arabian light crude. In other aspects of this litigation, the court has learned that such defendants have installed in their refineries sophisticated and expensive equipment that has enabled them to accept heavy oil with a high sulphur content and derive therefrom refined products of higher quality and quantity than can refiners that do not possess such equipment. Thus, the lower tier Wilmington oil has a greater refining value to some of the defendants than it does to other refiners.

These circumstances provide no reason why such a defendant would be expected to publish a willingness to

pay any more for controlled Wilmington oil than is offered by more marginal refiners, so long as it can obtain, at such prices, all of the oil that it needs for its refineries. A refiner presumably will post prices on the basis of what he must pay in order to get the oil that he needs. If the market price of heavy controlled crude is low because other refiners find it less valuable to them than uncontrolled or imported oil, the posting refiner will buy at the reduced price even though his *refinery values* would have justified his paying more. During the period of the Entitlements Program, the record indicates that there was no shortage of heavy crude oil in Southern California. Thus, the fact that such oil may have had more refining value to some defendants than to other refiners is, in itself, irrelevant to market value.

The plaintiffs' reliance upon several additional documents from the defendants' files is not fully disposed of by the foregoing comments. These documents could justify the inference that the respective writers believed that heavy uncontrolled Wilmington oil was of greater value than uncontrolled oil or foreign oil. The significances and import of some of these papers are very hard to understand, as are the contexts in which they were written. Most of them appear to pertain to individualized situations. I find such documents to provide an insufficient foundation upon which to mount a major antitrust case based upon the asserted immateriality of the Entitlements Program, in the face of the unanimous contrary conclusions by current participants that were discussed earlier in this memorandum.

The remaining question is whether or not my above-discussed conclusions concerning the preemptive effect of the Entitlements Program justify a summary judgment disposition. I believe that an affirmative answer is warranted. This is not an issue in which the credibility of witnesses is involved; the evidentiary facts are contained

in contemporaneous documents and are not in dispute; and the meaning and significance of such documents are for the court to determine. Also, the ultimate question is one of mixed fact and law and is not the type of matter that is within the common experience of jurors. It seems to me that the problem here is much like the one that District of Columbia Circuit faced in *Fox v. Johnson & Wimsatt, Inc.*, 127 F.2d 729, 736-37 (D.C. Cir. 1942):

> "There was conflict concerning interpretation of the facts and the ultimate conclusion to be drawn from them * * *. But there was none as to the facts themselves. In other words, the evidentiary facts were not substantially in dispute. * * * Conflict concerning the ultimate and decisive conclusion to be drawn from undisputed facts does not prevent rendition of a summary judgment, when that conclusion is one to be drawn by the court. The court had before it all the facts which formal trial would have produced. Going through the motions of trial would have been futile."

In light of all of the foregoing, this court finds that there is no genuine issue of material fact in contravention of the conclusion that from November 1, 1974, until after the end of the damage period at the close of 1977, the Entitlements Program, rather than any alleged conspiracy, was the reason for the assertedly low prices of controlled crude oil. Accordingly, summary judgment will be issued denying the plaintiffs any recovery of antitrust damages otherwise allocable to purchases of controlled oil from the Wilmington Oil Field after November 1, 1974.

The court recognizes that this decision and the earlier decision with respect to the effect of federal price ceilings, which I announced on July 17, 1984, involve controlling questions of law as to which there are substantial grounds for differences of opinion. I also believe that

immediate appeal from these two decisions may materially advance the ultimate termination of this litigation. Accordingly, I commend to the Court of Appeals that such interlocutory appeal be allowed if requested.

DATED: December 13, 1984

/s/ William P. Gray
WILLIAM P. GRAY
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MDL Docket No. 150 WPG

LONG BEACH

CV 75-2232-WPG

IN RE COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRODUCTS ANTITRUST LITIGATION

MEMORANDUM OF DECISION

[Filed Oct. 17, 1984]

Both sides have moved for summary judgment with respect to the legality of the practice known as the three-cut exchange. There have been extensive briefing and argument. Counsel were first heard on July 28, 1983. Formal hearing on the cross-motions took place on April 25 and 26, 1984, and this Court took the matter under submission. The subject also arose during the July 24, 25, 26, 1984 hearings regarding the allegedly fatal concessions of the plaintiffs' experts, since one of the experts had been designated to testify regarding the three-cut exchange system. The motions of the plaintiffs and of the defendants [1] for summary judgment now are both denied. I am, concurrently with the filing of this Memorandum, adopting some findings of fact and conclusions of law.

I. PLAINTIFFS' ARGUMENTS FOR PER SE ILLEGALITY

The plaintiffs contend that the three-cut exchange program, as conceived and employed by the defendants, is *per se* illegal under section 1 of the Sherman Act for

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[1] Exxon did not join in the defendants' motion.

three independent reasons: 1) that it removed crude oil price transactions from the marketplace and thereby interfered with the setting of prices by free-market forces; 2) that it enabled the defendants to avoid posted prices and thereby interfered with the competitive price mechanism; and 3) that the specific gravity adjustment to cut 3, itself, fixed a price. The plaintiffs argue that there is no material issue of fact with respect to any of these.

An important distinction is relevant to each of these arguments, namely, a distinction between the market for the purchase of crude oil at the well-head and the secondary, subsequent market in which the defendants exchanged the supplies of crude that they bought or produced. The troublesome question regarding the three-cut exchange has always been how transactions in the second market affected the first. The plaintiffs allege an antitrust injury in the first market—the market where the City of Long Beach sold its crude oil (and the crude oil of the State of California) to refiners. In order for the defendants' non-price system of exchange to fall under the proscription of *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), and thereby create liability to the plaintiffs, it must be established that either the purpose or the effect of the agreed-upon practice was to restrain competition in the market where the plaintiffs sold oil. This is more than a matter of standing to assert damages. *Cf. Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982). It is a matter of anticompetitive conduct; but there is nothing inherently anticompetitive or illegal about a system of trade in which commodities are exchanged for commodities.

A. Removal of Price Transactions from the Marketplace

If one accepts the above distinction between "markets" for the purpose of antitrust analysis, it follows, literally, that no price transactions were "removed" from the rele-

vant marketplace: once a barrel of oil is pumped from the ground and sold at the well-head for a posted price, the fact that it thereafter is swapped by the purchaser to someone else does not erase the first transaction, no matter whether the subsequent exchange is for a barrel of similar crude, a basket of sea shells or a bundle of dollar bills.

However, the plaintiffs argue further that the exchange system interfered with the setting of the prices of crude oil by free market forces. To the extent that the plaintiffs here refer to the "prices" prevailing in exchanges in the secondary market, the above analysis of markets is germane, and the plaintiffs' *per se* argument must fail. To the extent that the plaintiffs here refer to the posted prices (the prices prevailing in the market for the sale and purchase of crude at the well-head), a new question is raised: how did or could the non-price system in the secondary market disrupt or depress the price system in the primary market? A plausible theory, and one asserted by the plaintiffs in another context, is that if the defendants had traded among themselves entirely on the basis of posted prices, they would have been forced to raise the posted prices of heavy crude to the level of the "true" value of the crude (the value or rate of exchange prevailing in the barter market) in order to avoid the damage wrought by trading away their heavier crudes on the basis of artificially low prices. This argument is more closely related to the second asserted ground for *per se* illegality, to which we now turn.

B. Avoidance of Posted Prices

The plaintiffs argue that the clear purpose of the defendants in using the three-cut exchange was to avoid, in dealing among themselves, the very prices that they posted, and that this practice constitutes interference with the pricing of crude by free-market forces. In support of their *per se* argument, the plaintiffs rely upon

National Society of Professional Engineers v. United States, 435 U.S. 679 (1978), where the Court struck down a price-avoidance provision of an "ethics code" regulating the methods by which prospective clients engaged the services of professional engineers. The Society's code provision directly banned price comparisons in the initial selection of an engineer. The purpose and effect of the restraint were plainly to stifle price competition.

The alleged restraint here is not so plain, for it does not operate directly on the sale of oil by the plaintiffs to the defendants and similar buyers. It does not "ban" price transactions in the marketplace where plaintiffs have complained of an anticompetitive injury. But the *per se* inquiry does not end simply because the link between the three-cut exchange and the pricing of crude oil is less explicit than was the connection in *Professional Engineers*. The plaintiffs add another layer to the alleged *per se* plot. The reason that the defendants wished to avoid posted prices, according to the plaintiffs, is that posted prices "did not properly reflect crude values," and the conspiratorial avoidance of posted prices in exchanges meant that it was not necessary for the defendants to offer to pay to the plaintiffs amounts that would reflect competitive crude values. (Plaintiffs' Memorandum in Support at 30; Reply at 15, 16.) Thus, the plaintiffs posit a specific causal connection between the exchange system and the pricing of crude oil in the relevant marketplace.

There remains, however, a question of fact regarding this link. Defendants, as will be seen, vigorously deny that there could have been any anticompetitive effect of the exchange system upon the posted prices. And, in fact, the plaintiffs themselves recognize that the issue whether the "purpose and effect of the three-cut exchange was to prevent competitive pressures from raising the price of crude oil to their true value" is an issue that "involves material facts which are controvertible." (Plaintiffs' Op-

position to Defendants' Motion at page 20.) Thus, the second *per se* argument fails. If plaintiffs are to succeed on their claim that the three-cut exchange system is illegal as a price avoidance mechanism, they must demonstrate to the satisfaction of the trier of fact that the posted prices themselves were anticompetitively low and that a purpose of the three-cut system was to aid in the maintenance of those prices to the benefit of the defendants and to the detriment of plaintiffs.

C. The Specific Gravity Adjustment as a Price-Fix

It is undisputed that three-cut exchanges were employed by the defendants prior to the 1961-62 meetings that the plaintiffs assert were the genesis of the conspiracy. What the meetings accomplished was an agreement upon new technical definitions of the three "cuts" of crude oil. The new definitions measured quality by two yardsticks—first viscosity and then density—which could be applied to any of the very different crude oils produced in California and which were more precise than the simple API degree designation for the whole crude oil. For trading purposes, the defendants agreed: 1) on the viscosity definitions, or end boiling points of cuts 1 and 2, which correspond to distillation yields that might be obtained from each cut; 2) that cut 3 would be defined as the remainder, or residue, after the end boiling point of cut 2; and 3) that, as a further refinement, volumes of cut 3 traded would be subject to a specific gravity adjustment to 16 degrees API. In this adjustment is disguised a price, say the plaintiffs.[2]

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[2] Exxon was not in attendance. It cannot be disputed that the defendants that were present expended a lot of time and effort in arriving at mutually satisfactory definitions and measurements. The defendants assert that the meetings did not result in an agreement to use the new definitions, but of course the system would not have worked unless the defendants did each employ the same measurements. And, in fact, the defendants did just that beginning in April, 1962. Exxon used the agreed-upon definition in its exchanges beginning in 1969, when its refinery came on line.

Though the technical aspects of this argument are daunting, I believe that it is appropriate to set forth my understanding of them. Specific gravity is a measurement of the density of a substance relative to the density of water. The API scale is usually a more convenient way to describe the densities of crude oils. However, for purposes of keeping track of the qualities and quantities of cut 3 exchanged, the traders needed a very accurate method of adjusting volume. The need for accuracy arose because the cut 3 components of two different crudes of the same API gravity could be significantly different. A volumetric adjustment to the books of the trading partners was the easiest way to account for the differences in quality between two equal-volume crude oils and/or their cut components.

After discussion and study, the defendants agreed upon a base of 16 degrees API against which to measure the qualities of cut 3 traded and with which to compute a volumetric adjustment. If a company delivered one hundred barrels of a crude oil whose cut 3 component was 70% per barrel, the company, in industry parlance, delivered 70 barrels of cut 3. If that particular crude oil was determined to have a cut 3 component whose gravity was 14 degrees API (heavier than 16 degrees), the trading company would get credit for delivering somewhat less than 70 barrels of cut 3. Conversely, if the crude involved had a cut 3 component whose API gravity was 20 degrees (lighter than 16 degrees), the trading company would get credit for delivering more than 70 barrels of cut 3. The volume credited to the delivering company, or the "adjusted volume," is computed by multiplying the volume actually delivered by a fraction, the numerator of which is the specific gravity of 16 degrees (API) cut 3 and the denominator of which is the specific gravity of the cut 3 actually delivered.

The question is whether this method of volumetric adjustment involved any "price." On the face of it, there is

no dollar amount, and the plaintiffs do not contend otherwise. Rather, the plaintiffs contend that an approximately two cent per degree (API) differential [3] was *implied* in the specific gravity adjustment. That is, the plaintiffs contend that the defendants were trading among themselves on a basis that did not penalize heavier crude oils as much as did the posted price scale, where the gravity-price differential was approximately 5 or 6 cents.

As a matter of mathematics, the only way in which a "price" (per degree or otherwise) can be detected in the defendants' use of the specific gravity method is by the introduction of some refinery value expressed in dollar terms. That is, only by looking at the specific gravity adjustment from the vantage of an oil company that places a value on cut 3 can one see that a change in dollar value per degree change in gravity is implied. Working with the technical information on specific gravities provided in the appendix to the defendants' opening brief, and taking the refinery value of $2.85 per barrel assumed by Shell to apply to a 16 degree cut in 1962, as well as hypothesizing values down to $2.35, it is apparent that the specific gravity method yields on average, a gravity-price differential of approximately two cents per degree. That is, over a fifty-cent range in possible refinery values for a barrel of cut 3, the application of defendants' method yields an average gravity-price slope of two cents.

There are two important observations to be made about the above conclusion. First, the gravity-price differential calculated in the paragraph above has been shown to be applicable only to cut 3, and not to the whole crude oil. The defendants have injected enough doubt about the relation between cut 3 and the whole crude so that it cannot be held, on plaintiffs' motion, that the gravity adjustment for cut 3 "fixed" the price or the gravity-price

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[3] "Gravity-price differential" refers to the change in price associated with every degree change in API gravity.

differential of a whole crude oil. Second, the conclusion that a price per degree is involved is based entirely upon the dollar value of cut 3 assumed to prevail in the refineries of one defendant. Thus, because the defendants had different refinery values for cut 3, the specific gravity method had a different internal meaning, in terms of cents per degree, for each.[4] The difference may have been slight,[5] but the point is that the defendants did not agree on a *single* gravity-price slope, even for cut 3. Rather, even if we assume that it is proper to compare cut 3 values with the whole crude values, the effect of the specific gravity methodology would be to preserve for each defendant a gravity-value slope on the exchanges that approximated its internal gravity-value slope and was flatter than the posted gravity-price slope. This may or may not have introduced a rigidity in the pricing mechanism.[6] That depends upon the relationship between cut 3 and the whole crude, about which there is genuine debate.

II. DEFENDANTS' ARGUMENT THAT THE THREE-CUT EXCHANGE IS LEGAL, UNDER PER SE AND RULE OF REASON ANALYSIS

The defendants' motion on the issue of the three-cut exchange seeks a partial summary judgment to the effect that: 1) the practice is not *per se* illegal; and 2) the practice is valid under the rule of reason. The defend-

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[4] In fact, due to the nature of the exchange system, the defendants had to confront different dollar values (explicit or implicit in product-cut ratios) only when settling imbalances.

[5] The difference would be slight if the defendants had internal refinery values for cut 3 (or for heavy oil) that were similar to one another.

[6] It seems to me that if there is injury to the plaintiffs here, it stems from the disparity between the defendants' internal refinery values (and gravity-value differentials) and the posted prices (and posted price differentials).

ants argue that the facts are undisputed that the three-cut exchange system, as employed by them, is pro-competitive and has absolutely no anticompetitive purpose or effect.

The Supreme Court has cautioned in the antitrust context that "easy labels do not always supply ready answers." *Broadcast Music Inc. v. Columbia Broadcasting Systems*, 441 U.S. 1, 8 (1979). This is particularly true in the instant situation. The complexity of the challenged practice makes categorization very difficult.

It is clear that, standing alone, the defendants' three-cut exchange system (including the specific gravity method) is not "price fixing" in the sense in which that term is most often used. "Price fixing" is a "shorthand way of describing certain categories of business behavior to which the per se rule has been held applicable." *Broadcast Music, supra*, 441 U.S. at 9. The challenged practice is not an explicit agreement on a price; it is not an agreement not to bid or advertise price; it is not an agreement to buy excess supplies so as to relieve the market of a glut of product.

It is also clear that the exchange system had pro-competitive effects. Some of these are listed at pp. 34-35 of defendants' Memorandum in Reply, and I find the statements there numbered 1-6 to be established without substantial controversy. The plaintiffs do not disagree that some form of exchange of crude oil was necessary to the efficient functioning of the refining industry. Because of the refineries' need for continuous supply, the location and number of trunk pipelines, and the fact of private pipeline ownership, oils had to be commingled between the well-head and the refinery. A company naturally desired to ensure that the quality of crude oil that it produced or purchased would be substantially the same as the quality that found its way to the company's refinery. Posted prices could have been used to account for whole crudes exchanged, but if a more precise indicator

of quality was desired, some sort of petro-chemical measurement had to be used. What the defendants gained in precision via the use of badger tests and three-cut accounting was probably offset somewhat by the loss of ease of administration.

In view of the foregoing, if it were proper for me to view the three-cut exchange in isolation, I would have to conclude that the practice is not *per se* illegal but instead is to be judged under the rule of reason. On the other hand, it is equally clear that I cannot conclude, on a motion for summary judgment, that the exchange system, in context, had neither an anticompetitive purpose nor effect. The possible anticompetitive effect of the practice was described above in connection with the plaintiffs' arguments. As for evidence of anticompetitive purpose, there are several defendant documents prepared in the 1960's showing that the defendants recognized the disparity between posted prices and internal values for heavy crude oil (*e.g.*, the May 6, 1965 Memo circulated among Arco employees [exh. 1 to the plaintiffs' reply]) and that the value-price disparity was a factor in the wide-spread use of the three-cut exchange (*e.g.*, the April 19, 1968 Mobil memo from F.M. Springer; the March 13, 1969 Union Oil memo from Mr. Said; the June 10, 1964 letter from a Texaco employee to a Signal Oil employee). I would therefore have to conclude that the defendants are not entitled to a summary judgment of legality under the rule of reason.

The thrust of the above, rather tentative, discussion is that the three-cut exchange system should not, for purposes of the defendants' *per se* motion, be viewed apart from the allegation by the plaintiffs that the defendants conspiratorially designed and maintained such system as a means of avoiding having to raise their postings to the level of the competitive value of the crude oil. Such a contention raises questions of fact that the present record does not resolve, and the defendants' request for summary judgment is accordingly denied.

III. CONCLUSION

From all of the foregoing, I have concluded that factual considerations render summary judgment inappropriate on the three-cut issue. However, I am troubled by some strong impressions that, if confirmed by the facts at trial, would indicate liability on the part of the participating defendants.

If the posted prices for cut 3 oil had a spread of approximately five cents per degree of specific gravity and the defendants traded among themselves pursuant to a spread of about two cents per degree, significant legal results follow, unless each trade involved equal quantities and qualities of oil. Under the two cent spread, a higher relative value is necessarily given to the heavier oil than would be accorded the same quality oil under posted prices. It makes no difference whether the adjustment is made by only a bookkeeping entry, or in cash, or by giving credit for a somewhat larger amount of oil than was actually received. In one manner or another, the trader that gives up the heavier oil is going to be better off financially under a three-cut exchange than he would have been had the transaction been based upon posted prices. To the extent that such a result stems from an agreement, express or otherwise, designed to avoid increasing posted prices, it seems to me that it would constitute price fixing in violation of the antitrust laws.

The respective motions of the parties for summary judgment are denied. I have, however, modified and approved some Findings of Fact submitted by the defendants, and these will be filed with this Memorandum.

DATED: October 17, 1984.

/s/ William P. Gray
WILLIAM P. GRAY
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MDL Docket No. 150 WPG

LONG BEACH

CV 75-2232-WPG

IN RE: COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRODUCTS ANTITRUST LITIGATION

MEMORANDUM OF DECISION ON DEFENDANTS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT BASED UPON FEDERAL PRICE CEILINGS

[Filed July 16, 1984]

Following the hearing concerning the above-entitled matter, on April 26, 1984, and June 20, 1984, I have read the transcripts, given renewed consideration to the briefs, and have reread several of the cases cited therein. In light thereof, this court concludes that, as a matter of law:

(a) The plaintiffs, Long Beach and the State of California, were not exempt from any of the federally imposed price controls with respect to their "net profits" sales of crude oil to the defendants.

(b) Such exemption as did exist pertained only to "sell-off" and "in-kind royalty" oil.

(c) Irrespective of any conspiratorial conduct on the part of the defendants that the plaintiffs may establish,

the defendants' failure, after April 12, 1972, to pay above ceiling prices cannot be a basis for antitrust damages.

The proposed Findings and Conclusions submitted by the defendants (exclusive of paragraphs 84 through 105) include facts and legal conclusions upon which this court's determination is based. Although such Findings are somewhat more detailed than necessary for my decision, I believe them to be correct. Accordingly, after minor editing, I adopt them as my own rather than undertaking to make completely new Findings that would substantially be duplicative. A few supplemental comments are added here.

I. THE PRICE CONTROL REGULATIONS DID NOT EXEMPT THE "NET PROFITS" OIL SOLD BY LONG BEACH TO THE DEFENDANTS PURSUANT TO THE CONTRACTORS' AGREEMENT.

A. The wording of the regulations, themselves, calls for interpretation in considering the applicability of the exemption to net profits oil. 6 C.F.R. 101.34(a)(2), which was in effect during Phase II of the price control program, was similar in text to the later regulations. It provided for the exemption from price controls of:

> Price adjustments . . . by State and local governments for any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, facilities, materials, or similar thing of value or utility transferred . . . .

Those words, in themselves, do seem to cover "Price adjustments . . . for materials [crude oil] . . . transferred . . ." by Long Beach. However, the principal thrust of the regulation appears to be to avoid interfering with what a government may charge or assess in its taxing or licensing programs or for its normal governmental

services. It would seem very doubtful that the exemption was intended to cover sales of crude oil by Long Beach as one of many producers and sellers of oil in the marketplace where other producers clearly were subject to price controls.

Also, "Price adjustments . . . by State and local governments . . ." implies that the adjustments concerned are those that could be made by the government unilaterally in its discretion. Here, Long Beach lacks such authority with respect to its net profits oil. In addition, the text of the regulation does not reveal its applicability if the governmental body would not be entitled to receive and retain the full benefit of any "price adjustment".

In view of the foregoing, I find that the regulation, in itself, fails to express clearly its applicability to the issue here presented, and that therefore it is appropriate to consider the contemporary expressions and actions by the parties concerned as to whether sales of net profits oil were exempt from price controls.

B. The successive governmental price control agencies considered the sales of net profits oil not to be exempt. Although there appears to have been no document specifically proclaiming that net profits oil was subject to price controls, the following factors establish quite clearly that this was the official interpretation of the regulation:

1. The lament by Long Beach that the "unfair" price controls were ". . . costing California and the City of Long Beach $25,000,000 in the Wilmington Oil Field alone, . . ." went unheeded by the price control authorities. If the official policy had been that Long Beach could charge what it wished for its net profits oil, an acknowledgement of that fact could reasonably have been expected.

2. The FEO, in its notice of intention to remove the exemption of "sell-off" oil from price controls, asserted

that it "does not believe that the relatively small quantities of crude oil that are involved at present provide a sufficient basis for continuing the exemption . . . ." This shows an awareness that the much greater quantity of net profits oil would remain under price controls.

3. The memorandum of Mr. Carson, of the FEO staff, dated March 15, 1974, (defendants' Exhibit 164) distinguished between "working interest [net profits] oil" and royalty oil and considered the former to be under price controls.

4. The deposition testimony of Mr. Neeb and the affidavits of Mr. Walker and Mr. Buchanan serve to confirm the foregoing indications that the policy of the government was not to exempt from price controls oil belonging to a state entity unless the owner could adjust the prices unilaterally and would receive the entire benefit from such adjustment.

C. The officials of California and the City of Long Beach considered the sales of net profits oil not to be exempt, as shown by:

1. The resolution of the City Council of Long Beach, dated March 20, 1973 (defendants' Exhibit 89), complaining that ". . . the Cost of Living Council has recently frozen crude oil prices, including Wilmington crude oil prices, at their present levels", and asking that such ceiling be removed.

2. The night letter from Mr. Kenneth Cory to the CLC, dated July 30, 1973 (defendants' Exhibit 132), in which he asserted that the contemplated Phase IV regulations would freeze crude oil prices payable to the State of California, and asked that the gravity differential for ceiling price purposes be reduced to two cents per degree.

3. The active cooperation extended by Long Beach officials in supporting Mr. Buchanan's request for a ruling that sell-off oil would be exempt from price controls, and

in confirming his assertion that all benefits therefrom would go exclusively to Long Beach (defendants' Exhibits 30 and 32). This gives further strength to Mr. Buchanan's assertion in his affidavit that Long Beach officials were aware of the conditions that had to be fulfilled in order for the desired exemption to apply.

4. The requests on behalf of the State of California for a ruling that sell-off oil would be exempt from price controls (defendants' Exhibits 83, 130 and 138). Such requests made no mention of net profits oil, and thus they must have stemmed from an awareness that net profits oil was subject to such controls.

5. Mr. Flournoy's letter to the CLC, dated November 15, 1973 (defendants' Exhibit 152), opposing withdrawal of the price control exemption with respect to royalty oil and pointing out that the small amount of oil involved, 27,000 barrels per day, ". . . would have little or no effect on either the economy of the United States or on any crude oil allocation program."

D. The letters by Mr. Walker to Mr. Lamont, dated September 6, 1973 (defendants' Exhibit 140), and to Mr. Shavelson, dated October 26, 1973 (plaintiffs' Exhibit 16), do not overcome the above asserted conclusion that sales of Long Beach's net profits oil were not exempt from price controls. Mr. Walker, in his letters, does make the unqualified assertion that "Sales of . . . crude petroleum . . . by a state or local government are exempt" (plaintiffs' Exhibit 16), and that ". . . sales by the State of California of crude oil owned by the State falls within the exemption in Section 150.54(a)(2)." (Defendants' Exhibit 140). However, these letters clearly were in response to specific inquiries regarding sell-off oil. This is apparent from Mr. Shavelson's letter to Mr. Walker, dated September 17, 1973 (defendants' Exhibit 141), in which he requested a letter regarding ". . . royalty oil to be taken in kind by the State . . . at your very earliest convenience." Upon receipt of their respective letters

from Mr. Walker, California and Long Beach officials specifically referred to them as applying to sell-off oil (Exhibit 87 to deposition of William F. Northrup of September 24, 1973, and letter from John R. Mansell, City Manager of Long Beach, to the Mayor). Mr. Lingle, a deputy city attorney of Long Beach concerned with the City's sales of oil, believed, as of November 16, 1973, that the exemption was only applicable to sell-off oil. This was long after the Walker letter was received (Lingle deposition of August 18, 1981, page 885).

E. Conclusion. From all of the foregoing, as well as other evidentiary factors submitted at the hearings that are not discussed here, this court concludes that:

1. Sales of crude oil by a state or local government came within the subject price control exemption only if the selling governmental body had the unilateral right to adjust the price and would receive the entire benefit from any such adjustment.

2. Sales of net profits oil did not meet these conditions and therefore were not exempt from price controls.

II. THE PLAINTIFFS MAY NOT RECOVER ANTITRUST DAMAGES BASED UPON THE FAILURE OF THE DEFENDANTS TO PAY ABOVE CEILING PRICES.

For purposes of this decision, it is assumed, without in any manner deciding, that the prices for net profits oil received by Long Beach during the thirty-day period ending August 14, 1971, were set pursuant to conspiracy among the defendants. Once price controls were established, on August 15, 1971, Long Beach could not receive more for its oil than the ceiling allowed. From then until April 12, 1972, it could be argued with considerable logic that the defendants were legally responsible for the low ceiling, because it was based automatically

upon the conspiratorially adopted prices. However, on the latter date the Price Commission, after considering the arguments for a price increase urged on behalf of the California oil producers, refused to increase the ceiling to "correct economic balance." Thereafter, the ceiling remained because the appropriate governmental body, in the exercise of its discretion, determined that it should remain. Such action, whether fair and enlightened or not, supplanted the conspiracy as the effective reason for the level of the controlled prices.

In *Keogh v. Chicago & Northwestern Railway Co.*, 260 U.S. 156, 163 (1922), Mr. Justice Brandeis said that the antitrust laws ". . . give[s] a right of action to one who has been 'injured in his business or property.' Injury implies violation of a legal right. The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier." Similarly in the present case, the legal rights of Long Beach as against the defendants with respect to prices that may be charged and received are measured by the pertinent price controls, and they cannot be enlarged by the tort of the defendants.

At the April 26, 1984, hearing in these proceedings, Mr. Hoecker relied heavily upon his assertion that "if in fact the defendants had not conspired, the price would have been higher." This presumably is true. It also presumably was true in *Keogh* that if the defendants had not conspired, the rates that the plaintiff was obliged to pay would have been lower. It likewise was presumably true in *Okefenokee Rural Electric Membership Corp. v. Florida Power & Light Co.*, 214 F.2d 413 (5th Cir. 1954), that if the defendants had not conspired, the plaintiff would have been granted a permit to string its power lines along the critical roadway. Similarly, in *United Mine Workers of*

America v. Pennington, 381 U.S. 657 (1965), if the defendants had not conspired, the minimum wages that the plaintiff was obliged to pay probably would have been lower.

Mr. Hoecker undertakes to distinguish the above-mentioned cases from the present one by pointing out that "In each and every one of those cases it was the government's act that caused the injury. In this case . . . it was the defendants' conduct that caused the act." (Hearing transcript of April 26, 1984, page 317). He contends that Long Beach's injury was caused by the conspiracy, not by the government, and that the government's only participation was in failing to relieve the plaintiffs' injury by increasing the ceiling. (Hearing transcript of April 26, 1984, page 320). I am unable to see significance in such a distinction. In each of the cited cases, the action by the governmental body prevented the plaintiff from asserting against the defendants a "legal right" cognizable under the antitrust laws. The same is true here. The legal rights of Long Beach, as defined by the price controls, "cannot be varied or enlarged by either contract or tort . . ." of the present defendants. (*See Keogh v. Chicago & Northwestern Railway Co.*, 260 U.S. 156 at 163 (1922)).

The plaintiffs point out that the defendants are seeking to avoid damages attributable to their failure to pay above price ceilings that they were instrumental in setting. The plaintiffs assert that such a result would be unfair to the plaintiffs and allow the defendants to keep their "ill-gotten gains". This may be true. But price controls are inherently arbitrary, and, in pursuing the goal of controlling inflation, they inevitably operate unfairly in many situations. To the extent that the plaintiffs received ceiling prices from the defendants, they were paid all that the law allowed, whether or not the result be equitable. To the extent that the defendants paid ceiling prices, they

paid all that the law allowed and may not be obliged to pay more, whether or not the result be equitable.

III. CONCLUSION.

It is my understanding that the defendants paid ceiling prices for net profits oil during the entire period between April 12, 1972, and October 1, 1976. Under such assumption, the defendants will be entitled to summary judgment dismissing the plaintiffs' damage claims covering sales during that period. Such claim also will be dismissed for the period between October 1, 1976, and the end of the damage period, to the extent that the claimed appropriate competitive price exceeded the increased ceiling.

DATED: July 17, 1984.

/s/ William P. Gray
WILLIAM P. GRAY
U.S. District Judge

APPENDIX G

EXXON CORPORATION

Affiliates and Subsidiaries—Not Wholly-Owned *

AT&S Exploration Ltd.
Abu Dhabi Petroleum Co., Ltd.
Ace Polymer Co., Ltd.
Aditivos Orinoco, C.A.
Adria-Wien Pipeline GmbH
Aircraft Fuel Supply B.V.
Aishin Sekiyu K.K.
Alberta Products Pipe Line Ltd.
Al-Jubail Petrochemical Co.
Altona Petrochemical Co., Ltd.
Alyeska Pipeline Service Co.
Arabian American Oil Co.
Aramco Overseas Co.
Aramco Services Co.
Asakawa Sekiyu K.K.
Atlas Supply Co.
Atlas Supply Co. of Canada Ltd.
Australian Synthetic Rubber Co., Ltd.
Aviation Services Saudi Arabia Ltd.
Awaji Gas Nenryo K.K.
Azuma Sekiyu K.K.
BEB Erdgas und Erdoel GmbH, Hannover
BT Asia Securities Ltd.
B.W.O.C., Inc.
Bangkok Aviation Fuel Services Ltd.
Banshu Ekika Gas K.K.
Bayerische Erdgasleitung GmbH
Beaverhill Resources Ltd.
Bel-Air Entreposage S.A.
BRIGITTA Erdgas und Erdoel GmbH, Hannover
Bryan Woodbine Gathering Inc.

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* Does not include companies with less than 5% Exxon Ownership.

Byron Creek Collieries (1983) Ltd.
Canadian Reserve Oil & Gas Ltd.
Carlew Inc.
Carnduff Gas Ltd.
Cary Chemicals Inc.
Castle Peak Power Co., Ltd.
Champlain Oil Products Ltd.
Changi Airport Fuel Hydrant Installation Pte. Ltd.
Chinchaga Resources Ltd.
Chuo Sekiyu Hanbai K.K.
Clermont Coal Mines Ltd.
Comcor Chemicals Ltd.
Commercial Polymers Pty. Ltd.
Cynthia Gas Gathering Co., Ltd.
Compania Minera Disputada de Las Condes S.A.
Comptoir Auxiliaire du Petrole
Comptoir Oxonnaxion des Combustibles (C.O.C.)
Computer Centrum Groningen B.V.
DFTC Deutsche Fluessigerdgas Terminal GmbH
Daihatsu Sekiyu K.K.
Daiichi Kouyu K.K.
Demulsificantes Del Orinoco, C.A.
Depot Petrolier du Gresivaudan
Depots de Petrole Cotiers
Depots Petrolier de la Corse
Deudan-Holding GmbH
Deutsche Erdgas Transport GmbH
Deutsche Transalpine Oelleitung GmbH
Devon Estates Ltd.
Dixie Pipeline Co.
Dukhan Service Co.
E S F Ltd.
Eagle Kenso K.K.
East Texas Salt Water Disposal Co.
Eastcoast Spill Response Inc.
Eiko Sekiyu K.K.
Elwerath Erdgas und Erdoel GmbH, Hannover
Elwerath Erdoel und Erdgas AG

Emirates Chemicals Co.
Emori Sekiyu K.K.
Emsland-Erdoelleitung GmbH
Energie Marketing Service GmbH (EMS)
Entrepot Petrolier de l'Aveyron (E.P.A.)
Entrepot Petrolier de Mulhouse (E.P.M.)
Erdgas-Verkaufs-Gesellschaft mbH
Esso Chemical Alberta Ltd.
Esso Energie G.I.E.
Esso Exploration and Production Angola Inc.
Esso Malaysia Berhad
Esso of Canada Ltd.
Esso Resources Canada Ltd.
Esso Resources Enterprises Ltd.
Esso Resources N.W.T. Ltd.
Esso Resources (1989) Ltd.
Esso Resources Properties Inc.
Esso Resources Ventures Ltd.
Esso S.A. Francaise
Esso Standard Tunisie S.A.
Etablissements Cloarec
Exact Reisebyra A/S
Exxon Chemical Pakistan Ltd.
489061 Ontario Inc.
F. T. Giken K.K.
Federated Pipe Lines Ltd.
Ferngas Nordbayern GmbH
Ferngas Salzgitter GmbH
Forjas de Colombia, S.A.
Fuji Kogyo K.K.
Gasunie Engineering B.V.
General Bussan K.K.
General Highway K.K.
General Petrochemical Industries Ltd.
General Sekiyu K.K.
General Sekiyu Okinawa Hanbai K.K.
General Sekiyu Overseas Ltd.
General Shipping Co., Ltd.

General Unyu K.K.
Geobutane—Lavera
Gewerkschaft Brassert Erdoel und Erdgas GmbH
Gewerkschaft Erdoel-Raffinerie Deurag-Nerag
Gewerkschaft Gute Hoffnung Erdgas und Erdoel GmbH
Gewerkschaft Kuchenberg Erdgas und Erdoel GmbH
Glen Park Gas Pipe Line Co., Ltd.
Goroku Sekiyu K.K.
Grande Ecaille Land Co., Inc.
Great Eastern Oil Ltd.
Groupement Immobilier Petrolier
Groupement Liants Routiers du Gard Esso-Viafrance (G.L.R.G.E.V.)
Groupement Petrolier Aviation
Groupement Petrolier de la Cote D'Azur
Groupement Petrolier de Nantes
Groupement Petrolier du Finistere G.I.E.
Hamburger Gaswerke GmbH
Hannoversche Erdoelleitung GmbH
Hanshin Kyowa Sekiyu K.K.
Hayakawa Sekiyu K.K.
Heinrich Schneider Spedition GmbH
Hiroshima General Gas Juten K.K.
Hoei Sekiyu K.K.
Hokushin Bussan K.K.
Hokuyu Sekiyu K.K.
Home Energy Co., Ltd.
Home Oil Co., Ltd.
Hong Kong Pumped Storage Development Co., Ltd.
Houston Regional Monitoring Corp.
Hydranten-Betriebsgesellschaft
Hydrierwerke Poelitz AG
Imperial Oil Ltd.
Imperial Pipe Line Co., Ltd.
Inada Ekka Gas K.K.
Industria Acqua Siracusana S.p.A.
Industry Promotion Enterprises Ltd.
Intamix Corp.

Interhome Energy Inc.
Interprovincial Pipe Line (Alberta) Ltd.
Interprovincial Pipe Line (NW) Ltd.
Intoplane Service Co., Ltd.
Iranian Oil Participants Ltd.
Iranian Oil Services (Holdings) Ltd.
Iranian Oil Services Ltd.
Iraq Petroleum Co., Ltd.
Iraq Petroleum Pensions, Ltd.
Japan Butyl Co., Ltd.
Japan Coal Liquefaction Development Co., Ltd.
Jersey Nuclear-Avco Isotopes, Inc.
K.K. Aizu General
K.K. Daimaru
K.K. General Sekiyu Hanbaisho
K.K. Genetech
K.K. Heian Sekiyu
K.K. Ito Sekiyuten
K.K. Kanagawa Sekiyu Shokai
K.K. Kyoei Agency
K.K. Kyoei Shosha
K.K. Kyowa Sekiyu Service
K.K. Marugo Izumasa Shoten
K.K. Marutaka Sekiyu
K.K. Momose Sekiyu
K.K. Nippatsu
K.K. Sankyo Plastics
K.K. Standard Sekiyu Osaka Hatsubaisho
K.K. Toresen
K.K. Uwano Sekiyu Shokai
K/S Statfjord Transport A/S & Co.
Kai Tak Refuellers Co., Ltd.
Kanto Kygnus Sekiyu Hambai K.K.
Karlsruhe-Stuttgart Rohrleitung GmbH
Kawasaki Kygnus Sekiyu Hambai K.K.
Keihan Sekiyu K.K.
Keiyo Sekiyu Hanbai K.K.
Kenya Petroleum Refineries Ltd.

Kibo Sekiyu Hanbai K.K.
Kimura Sekiyu K.K.
Kinwa Sekiyu K.K.
Kobe Standard Sekiyu K.K.
Kowa Sekiyu K.K.
Kowloon Electricity Supply Co. Ltd.
Kumho E.P. Rubber Co., Ltd.
Kygnus Ekka Gas K.K.
Kygnus Kosan K.K.
Kygnus Marketing Service K.K.
Kygnus Sekiyu K. K.
Kyushu Eagle K.K.
LPL Investments, Inc.
La Societe Acadienne de Recherches Petrolieres SAREP
Lakehead Pipe Line Co., Inc.
LEAG Aktiengesellschaft fuer luzernisches Erdoel
Les Docks des Petroles d'Ambes
Long Beach Oil Development Co.
Maasvlakte Coal Terminal B.V.
Maasvlakte Olie Terminal N.V.
Magota Sekiyu K.K.
Mainline Pipelines Ltd.
Manito Pipelines Ltd.
Maple Leaf Petroleum Ltd.
Marugo Gas K.K.
McColl-Frontenac Inc.
McColl-Frontenac Oil Co. Ltd.
MEGAL FINCO
MEGAL GmbH
Meiji Sekiyu K.K.
MESBIC Financial Corp. of Houston
Metro Fuel Co., Ltd.
Mikawa Bussan K.K.
Minerals Ltd.
Mittelrheinische Erdgas Transport GmbH
Montreal Pipe Line Ltd./Les Pipe-Lines
Montreal Limitee
Mount Hanikris Ltd.

Mount Thorley Coal Loading Ltd.
Mr. Lube Canada Inc.
Mytex Polymers Inc.
NAM—K 7 B.V.
NAM—K 14 B.V.
NAM—K 15 B.V.
NAM/CLOMS—K 8/K 11 B.V.
NAM/CLOMS—L 13 B.V.
NPC Services, Inc.
N.V. Nederlandse Gasunie
Nakabayashi Sekiyu K.K.
Nansei Oil Terminal K.K.
Nansei Sekiyu K.K.
Nanseki Kaihatsu K.K.
Native Venture Capital Co., Ltd.
Near East Development Corp.
Nederlandse Aardolie Maatschappij B.V.
Neptune Bulk Terminals (Canada) Ltd.
Nichimo Oil (Bermuda) Co., Ltd.
Nichimo Sekiyu Seisei K.K.
Nikko Sangyo K.K.
Nippon Unicar K.K.
Nisku Products Pipe Line Co., Ltd.
Nissei Sekiyu K.K.
Norddeutsche Erdgas-Aufbereitungs GmbH
Norddeutsche Mineraloelwerke Stettin GmbH
Nordrheinische Erdgas Transport GmbH
Nord-West Oelleitung GmbH
Noroxo
Northward Developments Ltd.
Nottingham Gas Ltd.
107580 Canada Inc.
151742 Canada Inc.
159129 Canada Inc.
160440 Canada Ltd.
160837 Canada Ltd.
165548 Canada Ltd.
165549 Canada Ltd.

165550 Canada Ltd.
165899 Canada Ltd.
Office Prive d'Assurances et de Courtages
Offshore Medical Support Ltd.
Oil Field Chemicals Co. (Saudi Arabia), Ltd.
Oil Service Co. of Iran (Private Company)
Oil Spill Response Ltd.
Oil Transport Co. (Saudi Arabia), Ltd.
Oilship Ltd.
Oldenburgische Erdoel GmbH
Osaka Ashyu Nenryou K.K.
Osaka Propane Gas Hambai K.K.
Osaka Sekiyu Gas Yuso K.K.
P.A.C. S.A.R.L. (Pinson Allegret-Causse)
P. T. Stanvac Indonesia
Pars Investment Corp.
Peninsula Electric Power Co., Ltd.
Petroleum Refineries (Australia) Proprietary Ltd.
Petroleum Services (Middle East) Ltd.
Petrosvibri S.A.
Pipe Line Services, Inc.
Plantation Pipe Line Co.
Portland Pipe Line Corp.
Primaer Oel GmbH
Progas A/S
Progas Ltd.
Raffinerie du Midi S.A.R.L.
Rainbow Pipe Line Company, Ltd.
Redwater Water Disposal Company Ltd.
Refineria Petrolera Acajutla, S.A.
Rheingas Erdgasleitungs-Gesellschaft mbH
Rochevert Inc.
Rotterdam Antwerpen Pijpleiding (Belgie)
Rotterdam-Antwerpen Pijpleiding (Nederland) N.V.
Ruhrgas AG
S.A. Gestion de Stocks de Securite (SAGESS)
S.A. de la Raffinerie des Antilles
S.A. des Hydrocarbures

S.A. du Pipeline a Produits Petroliers sur Territoire Genevois (SAPPRO)
S.A. "Escuela Campo Alegre"
S.A. "Produits Lubrifiants de Madagascar"—PROLUMA S.A.
S.A.R.L. Viain
S.O.P.—Societa Oleodotti Padani S.p.A.
Saitama Sekiyu Hanbai K.K.
Sakurajima Futo K.K.
Sanyo Sekiyu K.K.
Saraco S.A.
Saudi Arabian Lube Additives Co., Ltd.
Schubert KG
Scurry-Rainbow Oil Ltd.
SEAG Aktiengesellschaft fuer schweizerisches Erdoel
Seibu Kygnus Sekiyu Hambai K.K.
Seismic Industries A/S
Senpoku Oil Service K.K.
SERAM S.p.A.
Servacar Ltd.
Shehtah Drilling Ltd.
Shimoyama Sekiyu K.K.
Shin-Nihon Yukagaku Kogyo K.K.
Shinohara Oil K.K.
Shizuoka Kanesho Hambai K.K.
Smiley Gas Conservation Ltd.
Sociedad de Inversiones de Aviacion
Sociedad Nacional de Oleoductos Ltda.
Societa Italiana per l'Oleodotto Transalpino S.p.A.
Societe Civile de Mustapha Algerie
Societe Civile de Participation pour la Destruction des Dechets Industriels (SOCDI)
Societe Civile Immobiliere "Courcelles-Etoile"
Societe Civile Immobiliere Khariessa
Societe Civile Immobiliere "Kleber-Etoile"
Societe Civile Immobilere "Les Casseaux-Bougainville"
Societe de la Raffinerie d'Alger
Societe de Manutention de Carburants Aviation

Societe de Manutention de Carburants Aviation Dakar-Yoff, S.A.
Societe de Promotion et de Financement Touristique (CARTHAGO)
Societe d'Entreposage de San-Pedro
Societe des Pipe-Lines de Strasbourg
Societe des Transports Petroliers par Pipe Line
Societe d'Etude et d'Exploitation de la Raffinerie du Tchad—S.E.E.R.A.T.
Societe d'Exploitation & de Developpement d'Operations Commerciales
Societe du Caoutchouc Butyl (SOCABU)
Societe du Pipe Line de la Raffinerie de Lorraine
Societe du Pipe-Line Mediterranee-Rhone
Societe du Pipeline Sud-Europeen
Societe Esso de Recherches et d'Exploitation Petrolieres Esso Rep
Societe Francaise Exxon Chemical
Societe "Geomines-Caen"
Societe Havraise de Manutention de Produits Petroliers
Societe Hoteliere de la Petite Campagne
Societe Immobiliere Paris-Niel
Societe Ivoirienne d'Operations Petrolieres S.A.
Societe Malgache de Raffinage
Societe Reunionnaise d'Entreposage
Socony-Standard-Vacuum Oil Co. (Petroleum Maatschappij)
Southern Natural Gas Development Pty. Ltd.
S.p.A. Raffineria Padana Olii Minerali—SARPOM
Standard Kosan K.K.
Standard Service K.K.
Statfjord Transport A/S
Stockage Geologique de Gaz de Lavera
Sueddeutsche Erdgas Transport GmbH
Sun East Co., Ltd.
Syncrude Canada Ltd.
Synergistics Industries Ltd.
204383 Enterprises Ltd.

363011 Alberta Ltd.
369772 Alberta Inc.
393193 Alberta Inc.
TAR-Tankanlage Rumlang AG
TBN Tanklager-Betriebsgesellschaft Nurnberg mbH
TGF Tankdienst Gesellschaft Frankfurt
TGM Tankdienst Gesellschaft Munchen
Taglu Enterprises Ltd.
Taihei Bussan K.K.
Taiko Sekiyu K.K.
Taisei Kogyo Sekiyu Hanbai K.K.
Takahama Kosan K.K.
Taketsuru Yugyo K.K.
Tanaka Sekiyu Hanbai K.K.
Tankanlage AG, Mellingen
Tanklager Altishausen AG
Tanklager Gesellschaft, Koln
Tanklager-Gesellschaft Tegel
Tanklager Lechelles I S.A.
Tanklager Taegerschen AG
Tecnica Quimica Petrolera, S.A. de C.V.
Tecumseh Gas Storage Ltd.
Texaco Canada Malaysia Inc.
THUMS Long Beach Co.
Thyssengas GmbH
TIBA Speditions GmbH
Toa Nenryo Kogyo K.K.
Tohko Plastics Co., Ltd.
Tohpren Co., Ltd.
Toko Sekiyu K.K.
Tonen Energy and Marine (Singapore) Pte. Ltd.
Tonen Energy International Corp.
Tonen Maintenance K.K.
Tonen Properties Inc.
Tonen Sekiyukagaku K.K.
Tonen System Plaza K.K.
Tonen System Service K.K.
Tonen Tanker K.K.

Tonen Technology K.K.
Tonex Co., Ltd.
Tophus Quen Pty. Ltd.
Towa Compounding Co., Ltd.
Towa Sekiyu K.K.
Toyoshina Film Co., Ltd.
Transalpine Oelleitung in Oesterreich GmbH
Trans-Arabian Pipe Line Co.
Trans-Northern Pipelines Inc.
Transgaz Lavera
Trimin Resources Inc.
Tsurumaru Unyu K.K.
Turkish Petroleum Co., Ltd.
UBAG—Unterflurbetankungsanlage Flughafen Zurich
Ulan Coal Mines Ltd.
United Industry Development Co., Ltd.
United Collieries Pty. Ltd.
Van Salt Water Disposal Co.
W.A.G. Pipeline Proprietary Ltd.
Wako Jushi K.K.
Wako Kasei K.K.
Wartempomp Nederland B.V.
Westdeutsche Erdoelleitungs-GmbH
Westgas GmbH
Westgastransport B.V.
Winnipeg Pipe Line Co., Ltd.
Worex S.N.C.
Yasaka Sekiyu K.K.
Yellowstone Pipe Line Co.
Yoshiki Sekiyu K.K.
Yoshimi Gas K.K.
Yuai Sekiyu K.K.
Yugen Kaisha Nishi Kobe Bosai Center

APPENDIX H

The affiliates and subsidiaries of Texaco Inc. listed on its most recent Form 10-K filed with the Securities and Exchange Commission are as follows:

Getty Oil Co.
Riverway Gas Pipeline Co.
Texaco Pipeline Inc.
Texaco Producing Inc.
Texaco Refining and Marketing Inc.
Texaco Trading and Transportation Inc.
The Texas Pipe Line Co.
Deutsche Texaco AG
Norsk Texaco Oil A/S
S.A. Texaco Belgium N.V.
S.A. Texaco Petroleum N.V.
Texaco A/S
Texaco Britain Ltd.
Texaco Denmark Inc.
Texaco Investments (Netherlands), Inc.
Texaco (Ireland) Ltd.
Texaco Ltd.
Texaco North Sea U.K. Co.
Texaco Oil Aktiebolag
Texaco Petroleum Maatschappij (Nederland) B.V.
Refineria Panama S.A.
Refineria Texaco de Honduras, S.A.
Texaco Brasil S.A.-Productos de Petroleo
Texaco Caribbean Inc.
Texaco Nigeria Ltd.
Texaco Panama Inc.
Texaco Petroleum Co.
Texaco Trinidad, Inc.
Texaco Petroleum Co.
Texaco Butadiene Co.
Texaco Chemical Co.
Texaco Canada Inc.
Texaco Canada Resources Ltd.

Texaco Canada Resources
Getty Marine Corp.
Texaco International Trader Inc.
Texaco Overseas Holdings Inc.
Texaco Overseas Petroleum Co.
Texaco Overseas Tankship Ltd.

(2) (2)

Nos. 89-987, 89-990

Supreme Court, U.S.
FILED
JAN 25 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

STANDARD OIL COMPANY OF CALIFORNIA, et al.,
Petitioners,

VS.

THE CITY OF LONG BEACH and
THE STATE OF CALIFORNIA,
Respondents.

EXXON CORPORATION and TEXACO INC.,
Petitioners,

VS.

THE CITY OF LONG BEACH, et al.,
Respondents.

RESPONSE TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

This case does not raise the questions posed by petitioners. The issue is whether the Court of Appeals erred in holding that triable issues of fact foreclosed summary judgment in this antitrust case charging petitioners with a successful conspiracy to fix prices when respondents produced *direct* evidence that:

1. petitioners completely controlled the relevant market;

2. all petitioners, except Exxon, expressly agreed on secret formulae fixing the prices at which they exchanged crude oils carried on their proprietary crude oil pipelines; Exxon joined its co-petitioners in performing that agreement from which no petitioner deviated during the relevant years;

3. petitioners' published ("posted") prices paid to respondents and to other independent producers of crude oil were significantly lower than the prices petitioners paid to each other for identical crude oils using their secret price formulae;

4. petitioners never competed with each other in trading crude oil on their exchange market or in the public market even in times of acute shortage of crude oil;

5. all petitioners engaged in other anticompetitive conduct affecting price, including the rigging of prices for Alaska crude, for the avowed purpose of protecting their artificially depressed posted prices for California crude oils;

6. respondents produced both direct and circumstantial evidence that petitioners' purpose was to fix higher prices for crude oils traded with one another and lower prices for crude oils bought from respondents and that the price fixing agreement enabled petitioners to pay respondents nearly $1 per barrel less than the competitive price for crude oil they extracted under their 35-year contract with respondents.

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Nos. 89-987, 89-990

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RESPONSE TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondents respectfully request that a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit be denied.

Respondents agree with the jurisdictional statement and the statutes involved as stated by petitioners.

STATEMENT OF THE CASE

Introduction

Respondent, City of Long Beach ("Long Beach"), as both oil field proprietor and trustee for respondent State of California, holds the mineral rights to the greater portion of the Wilmington oil field, one of California's largest crude oil fields.[1]

In 1965, Long Beach, acting for itself and as trustee for the State of California, opened for bidding the total production of Tract No. 1, the lion's share of the Wilmington oil field. ER 823. Texaco, Humble (now Exxon), Union, Mobil and Shell successfully bid for the Field Contractor's share of the total production of Tract No. 1. Under the 35-year "Contractors' Agreement", the joint venture assumed the right and obligation (1) to operate the field for respondents on a day-to-day basis and (2) to buy 80 percent of the total crude production, subject to "sell-off" provisions.[2] After lengthy negotiations and public hearings, an elaborate pricing provision was negotiated to assure that respondents would receive competitive market prices.[3]

---

[1] Before production commenced under contracts with the petitioners, the total recoverable reserves exceeded one billion barrels of crude oil. ER 1052 (Unless stated otherwise all "ER" cites are to the excerpt of record in Ninth Circuit Appeals Nos. 86-5859 and 86-5860).

[2] Ninth Circuit appeals Nos. 87-6301 and 87-6628 ("*Long Beach I* Contract") Excerpt of Record, ER 799 ¶ 6, 342.

[3] ER 3731-35. The pricing provision is Article 9 of the Contractors' Agreement, which became effective April 1, 1965. *Long Beach I* Contract ER 556-68. Socal and ARCO were also parties.

Respondents filed their antitrust claims in 1975 charging petitioners and former defendant Atlantic Richfield Company ("ARCO")[4] with conspiring to fix prices they paid for respondents' crude oil from 1971 to 1975 (later through 1977). The case was pretried for a decade during which petitioners filed 16 summary judgment motions. On June 19, 1985 the district court entered a two-paragraph summary judgment dismissing the antitrust claims. Three months later, that court issued a memorandum decision revealing that it had weighed the evidence, resolved conflicts in the evidence against respondents and decided issues of credibility in petitioners' favor.[5] Respondents appealed and the Court of Appeals reversed holding that triable issues of fact foreclosed summary judgment. Petitions for rehearing and suggestions for rehearing *en banc* were denied on September 22, 1989.[6]

Contrary to petitioners' contentions, proof of the conspiracy did not rest only on circumstantial evidence, and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) is inapplicable.

Petitioners' brief completely ignores the abundant evidence produced by respondents in opposition to their summary judgment motions that *prima facie* established every element of their § 1 conspiracy case. Instead, they argue as if the district court's findings were made in a non-jury case following a trial on the merits.

Respondents introduced *direct* evidence that:

1. The petitioners, together with Getty and former defendant ARCO, were the "Majors", who together controlled the relevant market as transporters and refiners of crude oil, supposedly in

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[4] ARCO settled with respondents in 1984.

[5] The memorandum decision is set forth in Socal petitioners' App. C. An earlier decision denying summary judgment is set forth as App. D to Socal petitioners' brief. No additional evidence was produced by petitioners in the interim.

[6] The order denying rehearing is annexed to Socal petitioners' brief, App. B.

horizontal competition with one another at the production, transportation, refining and marketing levels of the petroleum industry;

2. Standard Oil Company of California ("Socal"), Mobil Oil Corporation ("Mobil"), Shell Oil Company ("Shell"), Union Oil Company of California ("Union"), Texaco Inc. ("Texaco"), former defendant ARCO and non-defendant Getty Oil Company entered into an express agreement, negotiated in 1961-62, to trade crude oils ("crude") with each other over their interconnected proprietary pipelines using secret 3-cut exchange formulae setting prices nearly $1 per barrel higher than those they publicly announced ("posted") and paid to respondents and to other independent California producers for the identical oil they exchanged;[7]

3. The Majors' 3-cut exchange agreement had an immediate depressing effect on posted prices. Thereafter, and throughout the relevant years, posted prices for heavy California crudes remained flat despite gross changes in supply and demand;

4. The Majors, price posters and non-posters alike, zealously adhered to a policy never to pay higher than posted prices to independent producers and never to bid against each other for crude on the basis of price even when experiencing severe shortages of California crudes for their refineries;

5. The Majors regularly shared advance pricing and other sensitive proprietary information; and

6. The Majors rigged the prices for Alaska crudes in order to maintain the depressed prices for competing California crudes.

Contrary to petitioners' argument, respondents have not relied on the doctrine of "conscious parallelism" to establish their *prima facie* case because their direct evidence was more than sufficient

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[7] ER 426, Finding 19. Texaco withdrew from the negotiating sessions before the last meeting on advice of counsel, but shortly after the 1962 agreement it rejoined the conspiracy and traded crudes on 3-cut exchanges under the new rules. Exxon Corporation ("Exxon", formerly "Humble") joined the other petitioners in the scheme in the late 1960's when it began trading on 3-cut exchanges.

to demonstrate concerted action to fix prices. Although certain language in the opinion of the Court of Appeals is inartistic, that Court unmistakably recognized that respondents' evidence *prima facie* proved petitioners' price-fixing agreement, that all petitioners performed that agreement and that the scheme succeeded in depressing prices paid for respondents' oil.

Some knowledge of the unique characteristics of the relevant market is necessary to an understanding of this price-fixing scheme and why it worked for so many years.

Essential Characteristics Of The Relevant Market

The geographical market is California, which was isolated from the other U.S. refining areas because crude oil pipelines did not connect California with other districts.[8]

The Majors not only dominated the relevant market, they *were* the market. Aside from some small independent refiners, the Majors were the vertically integrated refiners, crude transporters, buyers and sellers of refined petroleum products in California. Before Exxon entered the California refining market, the Majors combined owned 90 percent of the refining capacity, controlled almost all the tanker terminal facilities and, with minor exceptions, owned all of the crude oil pipelines.[9] All of them were members of the "pipeline club".

The key element in the creation and successful maintenance of the price-fixing scheme is the lack of common carrier crude oil pipelines in California. The pipelines were all privately owned by the Majors and operated as proprietary carriers. The lack of common carrier pipelines was unique to California.[10]

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[8] ER 2572A, 862.

[9] ER 784, 862, 888A. These figures include Phillips and Getty, which were at various times integrated petroleum firms in the 1960's.

[10] ER 862, 888A.

The pipeline owners were well aware of the market power the proprietary pipelines created.[11] In an attempt to prevent the pipelines from becoming common carriers under California law, pipeline owners passed title to the crude in transit under exchange agreements.[12]

The interconnected crude pipelines were operated as an integrated system by which the Majors moved huge volumes of crude through each other's pipelines. Lack of access to the system would have put a refiner at an enormous competitive disadvantage.[13] No Major by itself had sufficient pipeline capacity to serve its refineries. Texaco had only 5 percent of total pipeline capacity and considered itself "at the mercy of other companies in the transporting of our crude oil supplies".[14] Exxon owned no trunk pipelines.[15] The Majors were, therefore, interdependent.

The Majors had a policy of denying pipeline access to all independent crude producers. ER 2490. Such producers had to sell their crudes to pipeline owners at artificially depressed posted prices. Pipeline control prevented competition at the wellhead.[16]

Posted prices are publicly announced prices a refiner will pay producers in an oil field. Prices are announced for each field

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[11] ER 1502, 886, 1253, 1236, 2932-34. "[W]e are quite limited in owned pipeline and tanker facilities and dependent on our competitors for the transportation of the major portion of our West Coast crude . . . ." ER 1258. See also ER 1255.

[12] Cal. Civ. Code § 2168; Cal. Pub. Util. Code §§ 211, 228; ER 2490.

[13] ER 865, 1054.

[14] ER 1253, 4226.

[15] ER 862, 3301.

[16] ER 886 [Exxon document] ("[A]nother important factor that contributes to control of prices by the large purchasers is the absence of common carrier pipeline facilities. This reduces the producers flexibility in marketing his production."); ER 865 ("[P]roducers in California have been unsuccessful in establishing higher crude prices because of lack of controlled outlet, due in no small part to crude oil pipeline ownership by the majors.")

separately by degrees of gravity using a scale established by the American Petroleum Institute ("API"). The heavier the crude, the lower is the API gravity number and its price, and vice versa. These price differences are called "gravity price differentials" ("GPD") or "gravity penalties". Posted prices are supposed to reflect the fair market value for the crude oil. *Long Beach I* Contract ER 604 ¶ 22. During the 1962-65 contract negotiations, petitioners repeatedly assured respondents that posted prices represented the "true market price" of the crude oil.[17] Petitioners induced respondents to adopt a pricing provision drafted by Socal which used petitioners' postings as the central pricing mechanism.[18]

Socal, was the price leader, and the other posters followed its lead; non-posters adhered to posted prices.[19]

During the relevant years, the posted gravity penalty for respondents' heavy crude was generally 7 cents per degree API per barrel[20] but everywhere else in the country the prevailing gravity penalty was only 2 cents.[21]

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[17] *Long Beach I* Contract ER 589, 700, 681, 650, 585.

[18] *Long Beach I* Contract ER 648, 655, 660.

[19] ER 4126-29, 4147-48, 2924. *Long Beach I* Contract ER 744. Except for temporary aberrations, posted prices were uniform. *Long Beach I* Contract ER 743-44.

[20] ER 2540, *i.e.*, for each degree API Wilmington crude declined, the posted price fell 7 cents per barrel (42 gallons).

[21] ER 2446. A senior East Coast Shell crude supply executive wrote: "[C]ontrary to all principles of sound economics and equity (a) we have artificially maintained dual crude oil price standards in the U.S.—high for EOR [east of the Rockies] and low for WOR [west of the Rockies], (b) furthermore the WOR price structure has been distorted (that is, the gravity gradient) by the action of a few large majors WOR because the remaining segment of industry, including Shell, neglected to exercise its proper influence in the market place. . . ." ER 2214. [Bracketed material added].

THE PRICE FIXING AGREEMENT

A. Events Leading To Development Of The 1962 Agreement

By the early 1960's improved refining technology made it possible to refine increasingly higher percentages of gasoline and other valuable light products from heavy crudes. ER 2053. The Majors' old exchange system no longer accurately accounted for crude values, and they could not agree on settlements of their exchange account imbalances.[22] By the early 1960's, the Majors knew that heavy crudes were especially underpriced.[23] A Major buying heavy crude at posted prices did not want to exchange it for a lighter crude at posted prices because it would thereby lose the benefit of underpricing of the heavy crude.[24] The Majors either had to abandon their old system and post competitive prices or radically alter the rules for pricing on exchanges. They chose the latter course.[25]

B. The Secret Meetings Of The "Exchange Committee"

During 1961-62, the Majors (excluding Exxon which had not yet entered the market) held five secret meetings to revise the system. Participants in the "Exchange Committee" meetings were crude supply managers of the Majors, including Getty and former defendant ARCO. Their purpose was to create a new mechanism for exchanging the Majors' crudes at prices more nearly reflecting their actual values.[26]

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[22] ER 1235, 1237, 2486, 2487, 2488, 3055, 3724-25.

[23] ER 2485. By 1961, the underpricing had become so severe that a Socal executive warned of adverse legal repercussions. ER 2031. By 1962, heavy crudes which were posted at about $2.50 per barrel, were underpriced by $1 per barrel. ER 1809.

[24] ER 1252, 1339, 2485.

[25] Huge volumes of crude moved on transportation exchanges and made exchange terms important to the Majors. The exchange market was large because enormous volumes of California crudes were carried by petitioners' pipelines. ER 4233-43.

[26] Numerous documents from petitioners' files reveal their purpose. ER 1339-43, 1252, 1235, 1237, 2486. A Mobil account of the final

Contemporary reports describe various methods considered for exchange pricing. The committee decided to retool the old 3-cut exchange system.[27] Devising a means for pricing "Cut 3" was an important and difficult problem because 60-70 percent of an average heavy crude is cut 3,[28] and it is in cut 3 that the most significant quality, i.e. gravity, differences among crude oils exist.[29] A club member trading away a crude which contained a significant amount of a more valuable, lighter residuum wanted to be compensated for receiving a less valuable, heavier residuum.[30] One proposal was to agree on so many cents in cash for each degree of difference in cut 3 gravities. That idea was quickly discarded because, if discovered, it transparently exposed the disparity between posted and exchange prices, and its price-fixing character was obvious.[31]

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meeting stated that the revision was agreed upon because "it was unanimously felt that an improved 3-Cut method was the most beneficial and equitable approach to the problem in view of disparities in California crude postings. . . .", i.e., posted prices did not reflect value of the crudes to the refiner. ER 1339.

[27] ER 1240-46, 1339-41. A "cut" is a distillation yield. The "cut" points are temperatures at which products are distilled from crudes in a laboratory test. Under the new 3-cut exchange rules adopted in 1962, "cut 1" is the product distilled by 400° F. It is essentially unfinished gasoline. "Cut 2" is the product distilled between 400° F and 550° F. It is essentially stove oil. "Cut 3" is the "residuum" and is similar to bunker fuel oil. ER 2189. In a sophisticated refinery, residuum can be further refined into lighter products using cokers and other advanced refining equipment. ER 1371.

[28] The cuts only exist on paper as a pricing and accounting mechanism. Physical cuts were not traded because sophisticated refineries do not produce them. Only whole crudes are transported on the pipelines. ER 2480, 1229, 2488, 1219.

[29] ER 4207. Cuts 1 and 2, were not considered to vary greatly in quality and so were fungible under the adopted formulae.

[30] ER 1188, 2459.

[31] ER 2168. Shell's counsel advised Shell's Exchange Committee representative that a general agreement on a gravity price differential should be avoided. ER 2220.

A more inscrutable proposal by Mobil was eventually accepted by the Exchange Committee. Cut 3 gravity differences were translated into a fictitious volume adjustment under a formula based upon specific gravities of cuts 3. The higher the gravity, the higher the cut volume credited. ER 2170.[32] The cut 3 volumes credited on petitioners' books translated into a price. ER 3825, 419. When the formula is decoded, the gravity penalty for cut 3 is about 2 cents per degree API.[33] The code became the price-fixing system used by all petitioners throughout the relevant years.

C. The 1962 Agreement Fixed The Price Of Crudes Traded In The Exchange Market

The formulae permitted the Majors to use a gravity penalty of about 2 cents instead of the 7 cent posted penalty. The agreement eliminated competition among the Majors in the determination of crude prices in the exchange market.[34] The formulae did not, as petitioners argue, reflect different Majors' refining values. As ARCO put it: "It is desirable that all companies agree on a single value differential to be applied to all crudes." ER 1191. And agree they did. The formulae set the exchange market price, not competitive bidding among refiners based on their estimates of their refining values. The pact was a naked price-fixing agreement among horizontal competitors. As this Court stated in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222-23 (1940): "[P]rices are fixed . . . if by various formulae they are related to the market prices. They are fixed because they are agreed upon." Crude oil exchange prices in California were agreed upon in 1962 and for at least 15 years thereafter. A Shell official in New York, unaware of the purpose of the scheme, commented on the "frantic lengths [to which] some people will go to avoid using the

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[32] Adjustments in cut 3 volumes were made on trading partners' books of account. The volumetric adjustment of cuts 3, and agreed equality for all cuts 1 and 2, fixed the value of whole crudes traded on 3-cut exchanges.

[33] ER 2171, 2507.

[34] A 1970 Mobil document crisply stated the impact of the formulae: "[I]n the Texaco [pipeline] system we would be buying gravity at less than 2 cents/barrel/° API. . . ." ER 1771-72.

U.S. dollar as the medium of exchange." He added, "[o]f course if you have to deal with people who only deal in sea shells you will have to go along. . . ." He concluded: "Before accepting the specific gravity proposal [for adjusting gravity differences in cuts 3] would suggest you try to get one or more of the sponsors to . . . reconcile it with their crude oil price postings."[35]

D. The Formulae Insulated Posted Prices From Competitive Market Forces And Permitted Petitioners To Maintain Depressed Posted Prices

Petitioners removed crudes traded on 3-cut exchanges from the posted price market and created a two-tiered price structure for the same oil.[36] Petitioners eliminated competitive pressures to increase posted prices by setting exchange market prices through their secret agreement instead of negotiations among the exchange partners. As a result, prices in the public market were profoundly and anticompetitively affected. Absent agreement on exchange prices among members of the pipeline club, the Majors would have had to raise posted prices.

Respondents' economic experts concluded:

> Exchanges, bereft of the concealment afforded by three-cut accounting, would have to reflect posted prices. Unconcealed exchange premiums would quickly result in higher crude purchase prices. ER 4194.[37]

After the scheme was in place, the posted gravity penalties for heavy crudes almost never fluctuated despite major changes in supply and demand, and posted prices remained flat from 1963-

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[35] ER 2218. See also ER 3003-05, 2217, 3006, 2504.

[36] The Majors exchanged respondents' Wilmington crude among themselves on 3-cut exchanges *before* the oil ever left the oil field, *e.g.*, ER 1891-96, a 3-cut exchange between Socal and ARCO. See also ER 2070, 1070, 1080, 1124, 2999-3000, 3227- 29, 3231.

[37] *Accord*, ER 3416. ("[T]he effect of the three-cut exchange system was to restrain competition for California crude oil and to depress the prices paid for that oil in the field."); ER 3417, ER 414-15.

69.[38] The industry as a whole was in short supply of heavy crudes during most of the 1960's and 70's,[39] and severe actual shortages were acknowledged in many of petitioners' documents.[40] Nevertheless, petitioners never bid against each other nor deviated from posted prices.[41]

Respondents produced unrebutted expert testimony that 3-cut exchanges subverted competitive market forces in setting posted prices and created a two-tiered pricing structure for the same crude. This result could not happen in a competitive market, as Dr. Saving explained:[42]

> In a competitive industry each refiner will maximize profits by consuming each crude oil input up to the point that its marginal value equals the market price. If a refiner has a higher valuation for a crude than the market price, it will

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[38] ER 3854. For example, Exxon required large volumes of heavy crude for its Benicia refinery, yet from the day its refinery began operations, it both projected and experienced actual shortages of heavy crudes. Nevertheless, it failed to act competitively and to offer higher prices for additional supplies. ER 905, 908, 917, 923-25, 927, 930, 935, 937, 944, 981, 984-86, 2161.

[39] ER 935, 1098, 1509, 2199, 2918, 3095, 1723, 1153. Only in 1968 did Union use all of its crude distillation capacity. ER 3495 ¶ 19.

[40] *E.g.*, "Our own demand for U.S. heavy crudes cannot presently be satisfied. About 12,000 barrel capacity of our cokers are unloaded." ER 2397. "Domestic supply from current avails is no longer sufficient to meet running in California." ER 1260.

[41] ER 3147, 3158, 3297-98, 4314, 4315, 4318. Price competition was avoided as a matter of policy and was disparaged as "pirating oil". ER 3147, 3157-59.

[42] Dr. Thomas R. Saving, one of respondents' economic experts, also testified:

> It is not possible in a competitive equilibrium for a crude oil to have two different values. Where two values do persist over time, the only conclusion that can be drawn is that competition has been somehow restrained so that one of the values could be artificially maintained. ER 3707.

> expand its use until the value of the last (marginal) barrel used is equal to its price. ER 3706.[43]

Respondents' economists confirmed the opinions, expressed contemporaneously by defendants' personnel who bought, sold and traded crude oils,[44] that marginal refining values were highly relevant to the determination of a competitive market price and that posted prices bore no relationship to petitioners' refining values.[45]

Petitioners introduced no economic testimony in the district court and have no plausible explanation for the gross and persistent divergence between their marginal refining values and their posted prices.[46]

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[43] This principle is black letter economics. See E. Gellhorn, *Antitrust Law and Economics* at 77-78 (1976), a text cited with approval in *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988) and in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 51 n.18 (1977). See also III P. Areeda & D. Turner, *Antitrust Law* 156 (1978) and ER 479, 399-401.

[44] In a 1966 review of Union's postings a senior crude trader observed:

> [T]he ultimate objective in crude pricing would be to relate crude prices to refining value . . . crude prices in California have no relationship to value . . . the 5¢ to 7¢ price spread we have between gravities is wrong and . . . a consistent 3¢ spread appears about what it should be. ER 2240.

[45] Respondents' economists' study of 18,000 of petitioners' refinery values concluded that petitioners and the market did not act competitively. ER 3901-07. See also ER 479-80. Dr. Anderson testified:

> The continuing excess of value over price . . . constitutes by definition non-competitive market performance. ER 3416.

See also ER 3708, 3373-74, 3891-92.

[46] Petitioners confuse the issue by addressing average barrel values, which are irrelevant, rather than last barrel (marginal) values, which are crucial to economic analysis of market behavior. Socal Pet. at 5. Dr. Saving explained:

> When refiners behave competitively, refining value exceeds the cost of acquisition for each barrel *before* the last (marginal) barrel consumed. ER 3707 (emphasis supplied).

E. Secrecy Was Crucial To Two-Tier Pricing

Although posted price exchanges were well known, the fomulae from the 1962 meetings were kept secret for more than a decade. The code was initially cracked in 1974.[47]

When petitioners began purchasing respondents' crude under the Contractors' Agreement in 1965, ARCO insisted upon and received agreements to indemnify it as the pipeline owner if respondents discovered trading of Wilmington crude among Majors at values higher than posted prices and then adjusted prices under the "most favored nation" clause of the Contractors' Agreement.[48]

When this litigation began, the details of the code were gradually revealed by discovery. Some documents translated "sea shells" into cash. Petitioners also delivered refined products to reduce cut imbalances using ratios to convert the cuts to their closest refined product equivalents. Petitioners discussed the need for such settlements at the 1961-62 meetings and agreed on how they would work. ER 2165, 2482, 2464, 1241-43. *E.g.*, petitioners' documents showed that cut-2 imbalances were to be settled by delivery of stove oil on a ratio of 1:1.[49] Because market prices for refined products are published, the prices of cuts were revealed by the conversion ratios. Product settlements showed 3-cut exchange prices were much higher than posted prices.[50]

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[47] The "Rosetta Stone" was a Mobil-Union exchange cut imbalance settlement document inadvertently produced to respondent State at a routine annual audit of Mobil pursuant to the Contractors' Agreement. ER 2256, 1464, 3192. The letter, which was immediately confiscated by a Mobil representative, revealed that price posters Mobil and Union, in their 3-cut exchanges, had placed a value on crude oils in excess of $1 per barrel above posted prices. ER 3737 ¶ 13. Petitioners all adopted a posture of delay and obstructionism when respondents thereafter sought 3-cut exchange valuation data. ER 3714 ¶ 6. See also 3736-37 ¶¶ 11-12.

[48] ER 1070, 1080, 1124-26, 1895, 2069, 3000, 3228-31. Petitioners' secrecy prevented application of the most favored nation clause to adjust prices paid respondents to the higher exchange values. ER 3821.

[49] ER 2165, 1243.

[50] ER 2299, 2248, 2250, 1960, 1961.

F. Petitioners Understood The Purpose And Effect Of Their Formulae

Petitioners each internally discussed the purpose and effects of the formulae in terms of pricing of crude oil[51] and admitted that their purpose was to trade crudes at their true values to avoid posted prices.[52]

Their documents are replete with admissions that posted prices for heavy California crudes were "artificially maintained," "most improper," lacked appropriate "relationship to value," "wrong," "less than true value," "a problem" and "way out of line."[53]

Petitioners internally adjusted for the distortions when they used posted prices in their analyses,[54] *e.g.*, petitioners placed "premiums" above posted prices on the heavier crudes,[55] in order

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[51] ER 2189, 3219-21, 1361-62, 2218, 2077, 2217, 3038-39, 3151, 2171, 2276.

[52] A Mobil memorandum, called the "layman's guide" to 3-cut exchanges, listed as reasons for using such exchanges:

* * *

(b) the disparity between the posted prices of heavy crudes in relation to light crudes

* * *

(d) crude pipelines are privately owned and operated and no major company has its own complete system to carry its own crudes. ER 1502.

See also ER 2306, 1233-34, 1339, 829, 3285, 2276, 2189, 1362.

[53] ER 2214, 2240, 2031, 1378. Mobil's West Coast Regional Manager for Crude and Product Supply wrote:

> One of the most improper situations existing relative to West Coast crude pricing is the matter of the 5 to 7¢ a barrel increments per degree of gravity. These increments should be no more than 3¢ a barrel and one day this situation will have to be corrected. ER 1378.

[54] ER 2417, 2297, 1981, 1993-94.

[55] ER 1981, 2240-41, 2485, 2231. One company called it "a bogey factor". ER 2231.

to make sound decisions about exploration, production and crude exchanges in the real world.[56]

G. Rigging Alaska Posted Prices Preserved The Benefits Of The California Price Fix

When light Alaska Cook Inlet crudes became available, petitioners faced a major problem because such crudes were primarily refined in California and thus competed directly with light California crudes. ER 1061, 1154-56. Petitioners knew that if they posted a two cent gravity penalty for such crudes, they could not expect to keep the prices of California crudes depressed. Those petitioners who posted prices in Alaska plus ARCO, therefore, knowingly adopted an artificially high 5 cent gravity penalty for light Alaska crudes in order not to "rock the boat" on their artificially high California gravity penalties although (1) their internal Alaska crude valuations justified a 2 cent GPD, (2) they had been trading Alaska crudes using a 2 cent GPD and (3) they knew a 5 cent GPD for Alaska crude was "unrealistic", "indefensible", had "no economic or technological reason" and was contrary to the economic self-interest of each.[57]

H. Petitioners' Price Signalling Helped Maintain Depressed Posted Prices

Petitioners and ARCO frequently communicated among themselves concerning their crude pricing. They provided each other advance notice of price changes, shared internal price forecasts and disclosed to each other calculations for prices and values of specific crudes.[58] Moreover, they told each other the reasons for their future price changes, disclosed their intentions not to change

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[56] ER 2086, 2053, 2062, 2146-48, 1929-32, 2279-81.

[57] ER 1711, 1061, 1075-76, 1144-45, 1154-56, 1496-97, 2065, 2088, 2865, 2874; 1328 ("A reduction in this price spread [the Alaska gravity penalty] would furnish arguments for those wishing to bring the price of heavy California crudes up closer to the light crudes"); 1078 ("The gravity differential change [to 2 cents] threatens California heavy crude price structure").

[58] ER 1851, 2232, 1835-36, 2419, 1122, 2003-05, 2001, 3020-22A, 2421, 2916.

prices over periods of time, discussed circumstances in which they would consider price changes and exchanged internal price forecasts for specific crudes.[59] *See United States v. United States Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978) (exchanges of current price information have "consistently been held to violate the Sherman Act").

Documents reveal petitioners' own recognition that their behavior was "prejudicial to other people in the industry", could be "construed as some sort of price fixing" and was in violation of company policies against telegraphing price changes and should not be committed to writing lest it be publicly exposed.[60]

I. All Of The Petitioners Had Incentives To Fix Low Posted Prices

Each of the petitioners had economic incentives to collude. All but Texaco and Exxon were net buyers of crude at the time of the Exchange Committee meetings. Texaco and Exxon later became net buyers, and all petitioners were net buyers throughout the damage period.[61] By the mid-1960's, Texaco and Exxon had developed refining plans to run heavy crude oils based upon the expectation that heavy crude posted prices would continue to be depressed, and each was dependent on the others for access to pipelines.

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[59] ER 1835, 1851, 1122, 2001, 2003-05, 2419, 2421-23, 3020-22A. A November 1976 Union document is self-described as an "early signal to our competitors . . . to suggest to our competitors that they keep the price of heavy oils low. . . ." ER 2421.

[60] ER 1851, 3068-69, 3291, 3293. Petitioners also exchanged extensive information about West Coast crude availabilities and identities of crudes they were running in their West Coast refineries, although they considered such information proprietary and confidential and would not exchange it elsewhere in the country. ER 2842-44, 3276, 1939, 1941, 1440, 1765, 2815-16, 2846-47, 3101-02, 3103-04, 3282-83, 2965, 3036.

[61] Even when net sellers, participation by Texaco and Exxon was quite rational. They had no means, save risky litigation against their co-petitioners, to alter posted prices, which were set by pipeline owners who were net buyers.

Petitioners argue that none had any motive to depress crude prices when they were net sellers. Petitioners ignore the fact that all of them always had an incentive to purchase respondents' Wilmington oil cheaply, that none could afford to demit from the pipeline club, and that all of them profited from the underpricing scheme.

Exxon and Texaco argue that the scheme to fix crude prices was implausible because they sold more crude at posted prices than they bought and that the 1962 agreement was simply a technical revision unrelated to pricing. They contend that the necessity of using co-petitioners' pipelines provided them no incentive to join the conspiracy, citing respondents' inability to produce a document from the pipeline owners threatening to cut off access if they did not join the conspiracy. As the Court of Appeals correctly decided, these arguments are properly directed to a jury.

A. Texaco

Texaco's argument that it had no motive to enter into the conspiracy because it always had more crude than it needed (Exxon Pet., pp. 6, 21-22) is contradicted by the evidence. Texaco became a net purchaser of heavy crude before completing the modernization of its Wilmington refinery in 1967 to better refine heavy crudes.[62] Texaco states that respondents conceded that Texaco did not have an incentive to keep crude prices low. Exxon Pet., p. 6. No such concession existed. It says that it sold more than 50 million barrels of California crude oil at posted prices. Pet., p. 6. Respondents introduced evidence that during the same period, Texaco purchased over 70 million barrels for a net purchase position of 20 million barrels.[63] Respondents intro-

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[62] ER 1206, 1263. An internal document states that a proposal to increase California crude prices "would result in a very substantial loss of earnings to Texaco" because "(1) Although we appear to be a net crude marketer in California our production includes substantial quantities of royalty oil which is actually purchased." ER 1206.

[63] Texaco's purchases included 20 percent of the joint venture's total Tract 1 production, an enormous amount of crude purchased at up to $1 per barrel less than its 3-cut exchange value. Texaco argues that it would

duced evidence that Texaco's motive in improving its Wilmington refinery was to take advantage of low heavy crude prices—the same motive that prompted Exxon to build its Benicia refinery.[64] Texaco decided to modernize its refinery by 1962.[65] Texaco expected large profits from its investment which depended on continued maintenance of low heavy crude prices. ER 1208, Supp. ER 2717, 4383.

Access to the pipeline network was essential to Texaco which owned only one inadequate pipeline. Costs of alternative transportation would have been "prohibitive."[66] Texaco knew it was "at

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have been irrational for it to join a conspiracy to depress crude prices because it traded away millions of barrels of heavy crude for light crude at posted prices after the 1961-62 meetings. Pet., p. 21. Respondents introduced evidence that the trades to obtain light crudes were a part of a quota transaction, *i.e.*, a deal whereby Texaco obtained import quota tickets at a substantial discount from their market value. Texaco traded one profit opportunity (underpriced heavy crude) for a greater opportunity (discounted quota tickets). Clerk's Docket 1620, Exh. 14.

Texaco also states that as late as 1968, it was turning down opportunities to buy California crude oil at posted prices and that, instead, Texaco needed to secure outlets for its excess supply. Pet., p. 6. Texaco's own documents reveal that Texaco refused to sell crude by the early 1970's because the company was facing a crude deficit. ER 1259-60, 1263. It further states that it profited when posted prices increased and lost revenues when prices declined. *Ibid.* Respondents' evidence established that this was certainly not true throughout the 1971-77 damage period.

[64] ER 779, 798, 875.

[65] By 1967 it had added cracking and coking capacity to refine residuum. ER 3889.

[66] Texaco's Manager of Pipelines and Crude Oil Purchases and Sales wrote in 1971: "We cite the following reasons for our use of Badger Type [3-cut] Exchange arrangements: 1. The West Coast majors favor their use and we are dependent upon them for the movement of the major portion of our crude oil avails. 2. Much of our crude is lower gravity and based on the Crude Rating Statements values, cannot be exchanged on a value basis without penalty. 3. We have no alternative but to rely primarily on the use of Badger Exchanges, since the cost of trucking our exchange crude would be prohibitive." ER 1225.

the mercy" of the pipeline owners.[67] Texaco estimated that 98.5 percent of its exchange volume was on a 3-cut basis.[68] Pipeline club membership gave Texaco the necessary access and diminished the penalties involved in trading crude at posted prices.[69] As a participant in the negotiations of the 1962 agreement, it was fully aware of the purpose of the scheme when it joined the club and followed its rules.

B. Exxon

Exxon argues that it was a net crude seller at posted prices until 1969, when its Benicia refinery began operating, and that its discoveries of crude in California and Alaska caused it to prefer higher crude prices.[70]

Exxon realized no production from Alaska until 1977, near the end of the damage period, and none from the Santa Barbara properties until the later 1980's. ER 986, 1023. Exxon anticipated as early as 1962 that when its refinery opened it would be a net buyer of California crude. ER 1054. Exxon's statement that in the late 1970's it "considered closing its California refinery but decided to continue with an operation to support the demand for crude oil to help maintain higher prices" (Exxon Pet., pp. 5-6) was contradicted by respondents' evidence that Exxon retained the refinery because it was then its most profitable option. Supp. ER 150, 195.

Exxon understood it required very large volumes of heavy crude at low prices to achieve the large profits it anticipated from such a refinery.[71] It expected heavy crude prices to remain depressed.

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[67] ER 1252-53. "Over 90 percent of our domestic supply is received via other company [pipe] lines on exchange."

[68] ER 1225, 1197-98.

[69] ER 1225. Much of Texaco's own production was heavy crude which it could not exchange on a posted price basis without a loss of value. ER 1264.

[70] ER 1054.

[71] ER 904, 915, 857, 875, 779, 795, 798-99, 864-65, 880, 888, 888-A, 1033, 1049, 851-860, 901.

ER 861, 865-66, 880. Before it ever planned to enter the refining market, it knew that it would be selling crude until its refinery was built, and it also knew that posted prices for crude were below market value.[72] Nevertheless, it joined the club because it knew that pipeline access was essential because it had no pipelines.[73]

Exxon sent scouts to study the California market before deciding to build a refinery. They met with the Majors and were told in confidence as early as 1965: (1) how the 3-cut exchange system worked;[74] (2) that the California refiners "worked closely together"; (3) that 3-cut exchanges were used because posted prices did not reflect crude values and (4) that pipeline club members refused to trade crudes of unequal quality on a posted price basis.[75]

Exxon's argument that it would have fought the club, rather than join the conspiracy to depress prices of heavy crude, might persuade a jury, but it cannot sustain summary judgment. The risks of such litigation against its world market peers could hardly be viewed as an attractive alternative to operating a profitable refinery and achieving access to the pipeline network.

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[72] ER 782, 1054, 875, 864-65.

[73] ER 865, 886, 888-A, 1034. Exxon fully understood without explicit threats that it was subject to the market power of the pipeline owners. Exxon's petition admits that its exchange partners "required" it to engage in 3-cut exchanges. Exxon Pet. at 21. Without such exchanges Exxon could not move its crude to its refinery. Respondents refuted Exxon's argument that it did not need pipeline club membership successfully to do business in the market because its pipeline needs were supplied by non-defendant Getty. Pet., p. 17. Before its acquisition, Getty was also a member of the pipeline club. Moreover, Exxon's crude was tributary to Socal's line, as well as to Getty's, and two of its three large 3-cut exchanges for movement of its crudes were with Socal. ER 841.

[74] ER 840-42, 848, 850, 834.

[75] ER 821, 824, 828, 842, 848.

PETITIONERS' EXPLANATIONS OF THE 3-CUT EXCHANGE ARE CONTRADICTED BY THE RECORD

To escape the web of the price-fixing conspiracy, petitioners argue that the 1962 agreement was simply a "technical revision" which did not fix prices on exchanges and which had no effect on posted prices. The argument fails on the record, on elementary economic principles and on controlling authority.

1. Petitioners argue that the 3-cut exchange agreement was merely a means of creating market efficiencies among refiners by saving transportation costs. Socal Pet., p. 5. Transporting crude through pipelines is efficient. The formulae were not used to improve transportation efficiency. They only priced exchanged crudes. The pricing code was not earlier used on exchanges in California, and it was never used anywhere else. When it was virtually abandoned in the mid-1970's, no disruption of the transportation system occurred. Petitioners have offered no evidence to demonstrate any competitive efficiencies flowing from the 1962 agreement.[76]

The complex and costly formulae were irrelevant to the enjoyment of the efficiencies of crude oil exchanges and pipelines. That efficiency is fully achieved using posted or individually negotiated

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[76] It is no defense to price-fixing that the agreement served some other purpose by creating some kinds of efficiencies. *E.g., Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982) (maximum fee schedule for competing physicians *per se* unlawful despite effectiveness as a cost-containment mechanism saving patients' and insurers' money); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980) (price visibility removal of barrier to market entry no defense to price-fixing); *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978) (banning competitive bidding to minimize risk of inferior engineering work no defense to price-fixing); *United States v. Masonite Corp.*, 316 U.S. 265 (1942) (despite desirable consequences and good business reasons for price-fixing arrangement, scheme was illegal *per se*); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) (beneficial results from increasing depressed gasoline prices no defense to price-fixing); *Federal Trade Comm'n v. Superior Court Trial Lawyers Ass'n*, ____ U.S ____, Supreme Court Docket Nos. 88-1198, 88-1393 (Jan. 22, 1990) ("[I]t is not our task to pass upon the social utility or political wisdom of price-fixing agreeements").

prices to value any differences in quality or quantity among exchanged crudes.

In fact the formulae sacrificed efficiency for secrecy. While complexity made the formulae difficult to penetrate, it also created an administrative nightmare for club members. It involved costly laboratory testing, sampling, compositing, storage and shipment of samples, crude assays, development of uncontrollable cut imbalances on books of account, account discrepancies between the exchange partners, and difficulty in settling cut imbalances involving negotiation of byzantine three and four party clearinghouse book transfers of cuts.[77] Substantial cut imbalances amounting to hundreds of thousands of barrels persisted for many years.[78]

2. Contrary to petitioners' argument (Socal Pet. p. 11), the question whether a particular pricing agreement is *per se* illegal does not turn on whether the agreement is proved by direct or circumstantial evidence.[79] However proved, an agreement setting prices among horizontal competitors is *per se* illegal if it threatens "the proper operation of our predominately free-market economy

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[77] ER 962, 1109-10, 1900, 1968, 1969, 1978-80, 2434, 3025, 3064, 3129-30, 3216-17, 3238-39A, 998, 1999, 3012-13, 3029-30, 1906, 1967.

[78] ER 959, 1028, 1031, 1217-18 , 1897-99, 2405-07, 2408, 2259, 3029-30, 1963.

[79] Petitioners rely on language from the Court of Appeals' opinion indicating its reluctance to hold the 3-cut exchange agreement illegal *per se* because the court was unsure whether the agreement had procompetitive aspects. The court said: "Whatever the effect of the three-cut exchange is on posted prices, the agreement concerning the exchanges themselves cannot be flatly classified as a price-fixing arrangement." Socal Pet. App., p. 8a.

If respondents' evidence that the purpose was to depress posted prices is ultimately credited by the trier of fact, the case cannot be successfully distinguished from *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 219-20: "Proof that there was a conspiracy, that its purpose was to raise prices, [here to depress prices] and that it caused or contributed to a price rise [here stability at depressed prices] is proof of the actual consummation or execution of a conspiracy under § 1 of the Sherman Act."

—that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.' " *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 19-20 (1979). Petitioners have not even begun to demonstrate that the effect of the challenged price-fixing agreement was to increase economic efficiency and render the relevant crude market more competitive.

RESPONDENTS PRIMA FACIE PROVED THE CONSPIRACY

In addition to proving the explicit agreement among petitioners, other direct and circumstantial evidence provided an abundance of plus factors *prima facie* establishing every element of a price-fixing conspiracy.

The posted price-fix could never have worked unless all members of the pipeline club followed the rules of the game. Those rules included never bidding against each other either on the exchange or in the public markets. No legitimate business justifications existed for paying each other higher than posted prices on exchanges. If prices in the exchange market reflected refinery values, so should posted prices. If the formulae provided a better measure of crude quality than gravity, why did petitioners not post prices based on refinery product yield instead of gravity? The crude was identical in both markets: exchanges were made before the crude even left the Wilmington field.

Direct and circumstantial evidence was used to establish petitioners' subjective intent to fix posted prices, and respondents produced ample evidence for that purpose.

REASONS FOR DENYING THE PETITIONS

Petitioners' arguments are based on two premises both of which are wrong: (1) the district court's findings were not controverted or, if they were, that court could properly decide issues of credibility, resolve conflicts and weigh the evidence on summary judgment; and (2) respondents' proof of conspiracy rested alone

on circumstantial evidence such as conscious parallelism. Based on these erroneous premises, petitioners argue that *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), required the Court of Appeals to affirm.

Petitioning separately, Exxon and Texaco argue that even if their co-petitioners conspired, Exxon and Texaco had no incentive to join a conspiracy to depress posted prices, and the Court of Appeals erred in failing separately to consider the evidence as to each of them. Again, the record belies their contentions.

A. Triable Issues Of Fact Foreclosed Summary Judgment

Petitioners have steadfastly refused to cite or even acknowledge respondents' evidence contradicting the "findings" of the district court. Instead, they rely on the findings themselves as if they were made by a trial court following a non-jury trial on the merits. The district court "tried" the case on summary judgment in violation of settled principles of summary judgment law. *E.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

B. Respondents' Evidence of Conspiracy Was Direct, Not Only Circumstantial

Without citing respondents' direct evidence, petitioners argue that respondents relied on circumstantial evidence alone because the district court concluded that the 1962 agreement did not fix exchange prices or, if it did, that those prices did not adversely affect posted prices. Therefore, they contend, supported only by their characterization of passages in the Court of Appeals' opinion, that all of respondents' evidence must have been circumstantial.

Petitioners have tried to distract the Court from respondents' direct evidence that the 1962 agreement adopted exchange pricing formulae to which all petitioners adhered, that their purpose and intent in adopting such formulae was to maintain depressed posted prices for heavy crude and that the scheme succeeded in creating two-tiered pricing for the same crude in the same oil field —a phenomenon unheard of in a competitive market.

On respondents' evidence, the 3-cut exchange agreement was a horizontal price-fixing agreement forbidden by *United States v.*

Socony-Vacuum Oil Co., 310 U.S. 150. It was a dual price-fix because it set exchange prices as well as posted prices. The exchange market-price-fix gave petitioners the means for maintaining depressed posted prices.[80]

Such an agreement is the "archetypal example" of an anticompetitive practice. *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980). Whatever economic arguments may be used to attempt justification of a horizontal price-fixing agreement, "they are all banned because of their actual or potential threat to the central nervous system of the economy." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. at 224, n. 59.[81]

Circumstantial evidence simply reinforced the conspiratorial nature of the agreement and its purpose to create and to maintain the two-tiered pricing system. The complexity of the scheme and the nightmarish administrative problems its created for petitioners, the rigging of Alaska crude prices and the exchange of advance pricing information among them buttressed the direct evidence of petitioners' conspiratorial scheme and its illegal purpose.[82]

When, as here, an antitrust plaintiff has produced direct evidence that horizontal competitors entered into an explicit agreement adopting formulae to set prices, no examination of their reasons for doing so need be probed. To complete their *prima*

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[80] In *Socony-Vacuum* the Court concluded that the raising and maintenance of spot market gasoline prices "were but the means adopted for raising and maintaining prices to jobbers and consumers." 310 U.S. at 191.

[81] *Accord: Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 346-347 (1982) ("We reaffirm what we said in *United States v. Socony-Vacuum Oil Co.* . . ."); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956).

[82] The Socal petitioners say: "There is not a shred of evidence anywhere in the record to support a theory of a four-company conspiracy." Socal Pet., p. 26. What respondents did produce was direct evidence of an eight-company conspiracy (all petitioners, plus ARCO and Getty).

facie case, respondents were only required to produce sufficient evidence to go to a jury that the price-fixing agreement caused some antitrust injury to respondents within the meaning of § 4 of the Clayton Act. *E.g., Zenith Radio Corp. v. Hazeltine Research,* 395 U.S. 100 (1969); *Continental Ore Co. v. United Carbide Corp.,* 370 U.S. 690, 697 (1962). Respondents, as sellers of crude oil produced abundant evidence for that purpose.

Texaco and Exxon argue that evidence to connect them with the conspiracy was only circumstantial and that they had no motive to join a conspiracy to depress posted prices because they were net sellers of crude at posted prices. Respondents' evidence contradicted them. Texaco was present when the 1962 agreement was negotiated. Exxon was not present at creation, but it, too, joined the pipeline club and both followed all the rules of the members' game. As this Court said in *United States v. Masonite Corp.,* 316 U.S. 265, 275-76, the purpose and the effect of the 1962 agreement were known to both of them:

> "The circumstances surrounding the making of the 1936 [1962] agreements and the [subsequent] joinder . . . of the two other companies leave no room for doubt that all had an awareness of the general scope and purpose of the undertaking. As this Court stated in the Interstate Circuit case (306 U.S. p. 227 . . .): 'It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. . . . Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.' "

Respondents produced ample evidence contradicting the assertions of Texaco and Exxon that they had no incentive to join a conspiracy in which an objective was maintenance of low posted prices. Although Texaco and Exxon did not initially derive as much benefit from depressed posted prices, their long-range plans were based on continued underpricing of heavy crude. A key factor in Texaco's modernization of its Wilmington refinery and Exxon's decision to enter the refining market and build its Benicia

refinery designed specifically to process heavy crude was the expectation that underpricing of heavy crudes would continue into the 1980's. Although the Court of Appeals did not expound at length on the evidence linking Texaco and Exxon to the conspiracy, the Court recognized the critical importance to those petitioners of pipeline access, low priced crudes to implement their long-range plans and the knowledge of each that continued underpricing of heavy crudes would make them profits.[83]

All of the petitioners knew that if competition had broken out either in the exchange or open markets, the system would have fallen apart. All petitioners insured that it did not fall apart in trading either California or Alaska crudes. The declarations of independence by Exxon and Texaco must be addressed to a jury.

Although the reasoning in the Court of Appeals' opinion was far more favorable to petitioners than the record justified, its conclusion is unassailable. The petitioners were not simply moving on parallel tracks, they were interlocked in their 3-cut exchanges on their pipeline network. They did not merely follow one another's prices, they all used the same pricing formulae. They did not belong to separate clubs following similar patterns of conduct, they were horizontal competitors belonging to the same club, obedient to the same rules. Adherence to those rules was a material cause of respondents' antitrust injury. No more evidence was necessary to take the case to a jury.

Petitioners' reliance on *Matsushita* is totally misplaced. In that case, plaintiffs charged a Japanese cartel with an implausible conspiracy to monopolize the American consumer electronics market by underpricing its products for 20 years. Plaintiffs produced no direct evidence of any combination related to a predatory pricing scheme upon which their claim for antitrust injury was based. Defendants produced justifiable reasons for their pricing activity, and plaintiffs failed to produce any evidence that the cartel had any rational reason to engage in the alleged predatory pricing conspiracy, the success of which was highly

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[83] As in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), the evidence revealed " 'a meeting of minds in an unlawful arrangement.' " (*Id.* at 764), and all of the petitioners played by " 'the rules of the game' ". (*Id.* at 766).

improbable from the outset. Moreover, if any such scheme ever existed, it had failed and the market was not monopolized.

Respondents' evidence is light years away from *Matsushita*. A price-fixing agreement was directly proved, plausible incentives for concerted action by all petitioners were established, benefits to each participant were contemplated and received, and the scheme was successful in fixing prices paid to respondents and other independent producers. It is the inference of independent action that is implausible in this case.

Petitioners' attempt to demonstrate a conflict among the circuits over the interpretation and application of *Matsushita* provides no reason to grant the petitions in this case because the claimed conflicts are irrelevant to the issues created by this record.[84]

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[84] Petitioners attempt in vain to demonstrate a relevant conflict among the circuits. *Park v. El Paso Bd. of Realtors*, 764 F.2d 1053, 1060-61 (5th Cir. 1985), *cert. denied*, 474 U.S. 1102 (1986), in fact, predates *Matsushita*. Petitioners rely on vertical restraint cases irrelevant to this horizontal price fixing case. In petitioners' Eighth Circuit case, *McCabe's Furniture, Inc. v. La-Z-Boy Chair Co.*, 798 F.2d 323, 330 (8th Cir. 1986), *cert. denied*, 108 S.Ct. 1728 (1988), the court ruled for defendant manufacturer in a vertical dealer termination dispute and applied the principles of *Matsushita*. The Eighth Circuit in vertical restraint cases routinely weighs competing inferences, contrary to petitioners' assertions (*e.g., Ryko Mfg. Co. v. Eden Services*, 823 F.2d 1215, 1229 (8th Cir. 1987) *cert. denied*, 484 U.S. 1026 (1988)), as does the Eleventh Circuit. *E.g., Dunnivant v. Bi-State Auto Parts*, 851 F.2d 1575, 1579-83 (11th Cir. 1988). The Eleventh Circuit case petitioners stress as evidencing the alleged conflict, *Helicopter Support Systems v. Hughes Helicopter*, 818 F.2d 1530 (11th Cir. 1987), is another vertical dealer termination case. *Helicopter* specifically applied principles from *Matsushita*, holding that (1) the conspiracy was economically reasonable (*Id.* at 1534), (2) the evidence tended to exclude the possibility of independent action (*Id.* at 1535), and (3) there was direct evidence of a price-fixing conspiracy. *Id.* at 1536. *Long Beach I* is not a proper case for addressing a purported conflict among vertical dealer termination cases.

CONCLUSION

Respondents carried their burden on summary judgment of proving every element of their *prima facie* price-fixing case. The Court of Appeals correctly decided that triable issues of fact foreclosed summary judgment in petitioners' favor. The district court's findings of fact could not be sustained without rewriting settled summary judgment law.

Even if any conflict existed among the circuits in interpretation of *Matsushita*, resolution of those conflicts would not overturn the decision of the Court of Appeals reversing the district court's summary judgment.

If a writ of certiorari were granted in order to correct flaws in the Court of Appeals' rationale, *Socony-Vacuum* would dictate affirmance because the 1962 agreement cannot successfully be distinguished from the horizontal price-fixing conspiracy condemned as a *per se* violation of §1 of the Sherman Act in that case. The Court has just reaffirmed *Socony-Vacuum* in *Federal Trade Comm'n v. Superior Court Trial Lawyers Ass'n* ___ U.S. ___, Supreme Court Docket Nos. 88-1198, 88-1393 (Jan. 22, 1990).

The history of this case is a melancholy testament to the abuse of pretrial procedures to avoid ever trying a case. This case should have been tried on the merits more than ten years ago. Further delay in bringing this case to trial should not be countenanced.

The petition for writ of certiorari should be denied.

DATED: January 25, 1990

Respectfully submitted,

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(3)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

EXXON CORPORATION AND TEXACO INC.,
Petitioners,

v.

CITY OF LONG BEACH AND STATE OF CALIFORNIA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY MEMORANDUM

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REPLY MEMORANDUM

Respondents' strategy in opposition is to make this appear a fact-bound case and thus to avoid discussing the erroneous legal propositions relied upon by the Ninth Circuit. There is very little correspondence between respondents' opposition and the decision below. The opposition, far from defending the judgment and opinion of the Ninth Circuit, urges positions rejected by the court of appeals and disavows positions adopted by that court. Whatever else respondents' opposition does, it offers no reasons why this Court should not review the decision below.

Three points should be made at the outset.

(1) Respondents claim they introduced direct evidence of a conspiracy to depress the posted prices of crude oil.

Most of their opposition is devoted to an elaboration of that claim. But as both courts below found, there is no such evidence. The district court, after an exhaustive review of the record, found that respondents "have no direct evidence of such a conspiracy," App. C at 33a, and the Ninth Circuit confirmed that respondents have "provided no direct evidence [of] conspiracy." App. A at 11a. A petition for certiorari cannot be opposed on the ground that there really was evidence that the courts below found absent.

(2) Respondents argue that the agreement to revise the three-cut method of accounting for exchanges of crude oil was illegal *per se*. Both courts below carefully considered and explicitly rejected that argument. App. A at 9a; App. C at 48a-49a. Respondents' reassertion of this argument is a red herring: it confuses an acknowledged agreement concerning how firms account for exchanges *among themselves* with an unproved conspiracy to fix the wellhead prices paid to *third parties*. The agreement on three-cut exchanges is not the conspiracy to fix low posted prices by which respondents claim to have been injured. The "3-cut exchange agreement," Resp. 3, is merely one tile in the mosaic of circumstantial evidence by which respondents hope to induce a jury to find the existence of a conspiracy to depress prices at the wellhead.

(3) Respondents say we are wrong to suggest they relied upon the defunct doctrine of "conscious parallelism." Resp. 3. We did not make that suggestion. It was the Ninth Circuit that, despite this Court's teachings to the contrary in *Theatre Enterprises, Inc. v. Paramount Film Distribution Co.*, 346 U.S. 537 (1954), relied upon that doctrine, App. A at 13a—an inconvenient fact which respondents attempt to avoid by saying the court's opinion is "inartistic." Resp. 4. If this case goes back for trial, respondents will no doubt attempt to rely upon this "inartistic" ruling before the jury.

With these attempted obfuscations out of the way, it is clear that the actual issues are those stated in our petition. The importance of those issues to the administration of justice can hardly be overstated. If the Ninth Circuit's contravention of basic principles of law is allowed to stand, the result will not be confined to a flouting of the rules established by this Court and the creation of a conflict between the Circuits. The practical results will include a massive waste of increasingly scarce judicial resources as courts preside over weeks- or months-long jury trials that should never have occurred, the probability of great injustices to parties when complex cases that should not have been tried are presented to unsophisticated juries, and the deterrence of valuable and entirely legitimate business behavior.

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT GOVERNING THE DISPOSITION OF ANTITRUST CONSPIRACY CASES ON SUMMARY JUDGMENT

We demonstrated in our petition that the Ninth Circuit committed major error by failing to consider the sufficiency of the evidence as it relates to Exxon and Texaco. Just such individualized consideration is required by *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978). *See* Pet. 13. The court of appeals further ignored the holdings of *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), and *First National Bank v. Cities Service Co.*, 391 U.S. 253 (1968), that an antitrust plaintiff may not reach the jury in a circumstantial case without having evidence that a defendant had a plausible economic motive to conspire—evidence, moreover, that tends to exclude the possibility of independent action. *See* Pet. 13-16. Instead, in clear defiance of *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and notwithstanding the facial implausibility of respondents' claim that sellers conspired

to depress their own prices, the Ninth Circuit rested upon respondents' speculative "explanation" of what might have motivated Exxon and Texaco to conspire. *See* Pet. 16-18.

These errors of law are the issues this case presents. They are crucial issues and respondents apparently know it, for they employ two insidious tactics to hide those issues from this Court and to make it appear that there is evidence about petitioners Exxon and Texaco where there is not. We address those tactics lest there be any misapprehension that the judgment below rests upon evidence that the Ninth Circuit simply failed to discuss.

A. *Respondents use collective nouns and broad-sweeping assertions in an effort to obscure the insufficiency of the evidence as it relates to Exxon and Texaco.* The Ninth Circuit committed fundamental error by failing to consider the sufficiency of the evidence with respect to Exxon and Texaco, considered individually, as required by *United States Gypsum.* Respondents invite this Court to perpetuate that error. Throughout, respondents make blanket allegations using terms such as "they," "petitioners," "the pipeline club," and "the Majors" to refer indiscriminately to all defendants in situations where there is no evidence connecting either Exxon or Texaco to the matter at hand. The instances in which this device is used are too numerous for individual mention. But respondents' opening list of six items of purportedly "*direct* evidence," Resp. 2 (emphasis in original), provides a fair sampling.

(1) Respondents begin by asserting that "petitioners" were "the 'Majors', who together controlled the relevant market." Resp. 2. In fact, as respondents later acknowledge, Exxon and Texaco "had no means . . . to alter posted prices, which were set by pipeline owners who were net buyers." *Id.* at 16 n.61.

(2) Respondents refer to "secret 3-cut exchange formulae setting prices nearly $1 per barrel higher than

those they publicly announced ('posted') and paid to respondents and to other independent California producers." Resp. 3. But neither Exxon nor Texaco posted prices; to the contrary, Exxon and Texaco, like "respondents and . . . other independent California producers," were *selling* at the posted price. Pet. 4, 6.

(3) Respondents assert that "[t]he Majors' 3-cut exchange agreement had an immediate depressing effect on posted prices." Resp. 3. Exxon was not a party to this agreement. Pet. 20-21. If the agreement did have "an immediate depressing effect on posted prices," both Exxon and Texaco, as substantial sellers of crude oil at the posted price, were directly and immediately harmed.

(4) Respondents claim that "[t]he Majors . . . zealously adhered to a policy never to pay higher than posted prices . . . even when experiencing severe shortages of California crudes for their refineries." Resp. 3. Posted prices in fact were raised during the only two documented periods of general shortage. App. C at 35a, 41a-42a. Exxon avoided forecast shortages of crude oil by importing its own cheaper foreign crude; there is no evidence that Texaco ever experienced a shortage prior to the imposition of price controls. Pet. 22.

(5) Respondents allege that "[t]he Majors regularly shared advance pricing . . . information." Resp. 3. This refers to the innocent practice pursuant to which price posters, as a courtesy, would notify both buyers and sellers of previously determined changes in price postings. *See* App. C at 43a-44a. Exxon and Texaco were not price posters and thus did not "share[] advance pricing information;" like respondents themselves, Exxon and Texaco were simply advised of the prices being offered. Supp. ER 3974-75, 3213, 3216-18.

(6) Respondents claim that "[t]he Majors rigged the prices for Alaska [Cook Inlet] crudes in order to maintain the depressed prices for competing California crudes." Resp. 3. This claim is repeated several times.

See id. at i, 15, 25, 27. But there is no evidence that Exxon or Texaco ever posted prices for or otherwise participated in the pricing of Alaska Cook Inlet crude oil; and Texaco sold all of its Cook Inlet crude—amounting to millions of barrels—at the posted price. Supp. ER 2740.

The Ninth Circuit succumbed to respondents' tactic of guilt by collective noun. The court made no effort to undertake conscientious assessment of the sufficiency of the evidence with respect to Exxon and Texaco, individually considered. This was not just a matter, as respondents put it, of "not expound[ing] at length on the evidence linking Texaco and Exxon to the conspiracy." Resp. 27. The Ninth Circuit failed to expound at all, because there was no such evidence.

B. *Respondents' argument with respect to motive, as it relates to Exxon and Texaco, rests upon misstatement and conjecture.* Throughout the 1960s Exxon and Texaco were sellers of crude oil with strong economic interests in *high* prices. Pet. 5-7. Respondents themselves admit that "Texaco and Exxon did not initially derive . . . much benefit from depressed posted prices." Resp. 26. This admission is a model of understatement. It hardly captures the full flavor of the $65 million loss that Exxon would have suffered as a consequence of the conspiracy that respondents allege. *See* Pet. 15. Nor does it reflect respondents' explicit concessions below—concessions that respondents now wrongly deny making, Resp. 17—that Texaco would have benefitted from higher prices. ER 4111; Supp. 7R 79. The indisputable fact is that Exxon's and Texaco's participation in a conspiracy to fix *low* prices is facially implausible.

In such circumstances, "respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary." *Matsushita*, 475 U.S. at 587. Respondents did not do so. They did not meet the minimum standard set by *Matsushita*: suf-

ficient evidence to support a rational jury finding that either Exxon or Texaco had a genuine motive to conspire. The Ninth Circuit, which incorrectly believed that *Matsushita* was restricted to cases of predatory pricing, App. A at 15a, implicitly recognized the absence of evidence when it relied not upon the record but upon respondents' mere "explanation of incentives to conspire." *Id.* at 14a.

In an effort to paper over this deficiency, respondents resort (as elsewhere in their opposition) to unsupported assertion and mischaracterization of the record. In the limited confines of a reply, it is possible to give only a few examples of this practice. Thus, respondents' record citations do not support their claims that "Texaco became a net purchaser of heavy crude before completing the modernization of its Wilmington refinery in 1967," Resp. 17; that "Texaco decided to modernize its refinery by 1962" and "expected large profits from its investment which depended on continued maintenance of low heavy crude prices," *id.* at 18; and that Exxon "knew that posted prices for crude were below market value" and had been told that "pipeline club members refused to trade crudes of unequal quality on a posted price basis." *Id.* at 20.

In the end, as in the courts below, respondents fall back upon sheer conjecture concerning "access to pipelines and long term refining plans." App. A at 14a. Their central allegations are that "Texaco and Exxon had developed refining plans to run heavy crude oils based upon the expectation that heavy crude posted prices would continue to be depressed," Resp. 16, and that "their long-range plans were based on continued underpricing of heavy crude." *Id.* at 26. But respondents cite no evidence in support of these assertions, and there is none.

Respondents further note "the critical importance to those petitioners of pipeline access." Resp. 27. Of course

access to pipelines was important. But there is no evidence whatsoever that pipeline owners, by threat or otherwise, coerced Exxon and Texaco to join a conspiracy to depress the price of crude oil. The absence of such evidence is fatal to respondents' theory of motive. *See* Pet. 17.

Respondents contend that arguments about the absence of supportive evidence "are properly directed to a jury," Resp. 17, and, indeed, "might persuade a jury." *Id.* at 20. But that gets the matter precisely backwards. The decision below subverts the summary judgment process and eviscerates the *Matsushita* requirement of motive by permitting respondents to go before a jury on the basis of mere conjecture about motive "and the hope that something further can be developed at trial." App. C at 33a, quoting *Weit v. Continental Ill. Nat'l Bank*, 641 F.2d 457, 462 (7th Cir. 1981).

* * * *

We have demonstrated respondents' misstatements of the record regarding Exxon and Texaco only to dispel the false impression that there is evidence linking these petitioners to the alleged conspiracy. While such evidence is indeed lacking, the point of the petition is the Ninth Circuit's serious and multiple departures from settled legal doctrine in (1) failing to give Exxon and Texaco the individualized consideration required by *United States Gypsum*, (2) failing to require evidence that these petitioners had a motive to depress their own selling prices, as required by *Matsushita* and *Cities Service*, (3) accepting arguments instead of evidence on the question of motive, contrary to *Celotex* and *Liberty Lobby*, and (4) ruling, contrary to *Theatre Enterprises*, that respondents could prevail on the long-discredited theory of conscious parallelism.

These are not factual but legal issues. Under the erroneous notions of law laid down by the court of appeals it is difficult to see how any defendant in an antitrust conspiracy case could ever obtain summary judgment. Taking these errors in combination with the court's adoption of "conscious parallelism," it will be an uphill struggle for even the most innocent defendant to prevail at trial.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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